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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

## No. 172.

NATIONAL BANK OF NEWPORT, NEW YORK, APPELLANT,

vs.

NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS, NEW YORK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED DECEMBER 15, 1909.

(21,930.)

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United States Circuit Court of Appeals for the Second Circuit.

NATIONAL BANK OF NEWPORT, NEW YORK, Complainant-Appellant,
vs.
THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS, Defendant-Appellee.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

*Transcript of Record.*

Printed under the direction of the clerk.

United States circuit court of appeals, second circuit. Filed Feb. 17, 1909. William Parkin, clerk.

1 United States District Court, Northern District of New York.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company,
vs.
THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.

On the 20th day of June, 1907, complainant filed his Bill of Complaint herein against the defendant, which bill is hereto annexed. A subpœna was thereupon issued and served upon the above-named defendant, which subpœna and proof of service thereof are hereto annexed. On the 25th day of July, 1907, defendant duly appeared in said action by Myron G. Bronner, its solicitor, and on the 24th day of July, 1907, filed its answer to the said Bill of Complaint, which appearance and answer are hereto annexed. On the 8th day of August, 1907, the complainant filed an amended bill of complaint in said action, and on the 28th day of September, 1907, the defendant filed its amended answer thereto, which amended bill and amended answer are hereto annexed. Testimony was thereafter taken by and in behalf of the respective parties, and the said cause was brought on for hearing and argued by counsel before the Hon. George W. Ray, Judge, at a term of said court held at Norwich, N. Y. After taking the cause under consideration the said Judge, on the 14th day of September, 1908, filed his opinion herein in favor of said complainant. On the 26th day of September, 1908, at a term of said court held in the Chambers of the Judge in the Village of Norwich, N. Y., a final decree was made and entered in said cause, which final decree is hereto annexed.

2 District Court of the United States, Northern District of New York.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company,
against
THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.

To the Honorable George W. Ray, Judge of the District Court of the United States in and for the Northern District of New York:

Charles B. Mason as trustee in Bankruptcy of the Newport Knitting Company brings this amended Bill of Complaint against the National Herkimer County Bank, and your orator complains as follows:

That your orator is a resident of the Northern District of New York, and that, on information and belief, the defendant is a domestic corporation located at Little Falls, in the said Northern District of New York; that a petition was duly presented to this court on or about the 30th day of December, 1903, asking that the said Newport Knitting Company be adjudged a bankrupt, and that after due hearing on said petition the said court made an order on the 23rd day of January, 1904, adjudging said Newport Knitting Company a bankrupt, and that in said proceedings your orator was duly appointed trustee in bankruptcy on the 24th day of February, 1904, and that he duly qualified and gave the required bond, and has ever since been and is now acting in said capacity.

3 Your orator further complaining says, on information and belief, that for more than six months prior to the 30th day of December, 1903, the said Newport Knitting Company was insolvent and unable to pay its debts, and that said company was indebted to the defendant herein in the sum of Five Thousand Dollars ($5,000) at the time of the filing of said petition in bankruptcy and had been for about four months heretofore; that within the period of four months prior to December 30th, 1903, the date of the filing of the petition in bankruptcy against the said Newport Knitting Company, and on or about the 26th day of September, 1903, paid to said defendant the sum of Five Thousand Dollars ($5,000.00), money belonging to said Newport Knitting Company; that said payment was made to defendant with the intent to prefer said defendant, and defendant had full knowledge at the time of said payment that said Newport Knitting Company was insolvent within the meaning of the laws of the United States relating to bankruptcy, or had reasonable cause to believe the said Newport Knitting Company insolvent and unable to pay its debts, and that the said payment was made with an intent to prefer the defendant over the other creditors of said Newport Knitting Company, and to enable the said defendant to receive a larger proportionate amount of money upon its indebtedness than could be received by any of the other creditors of said Newport Knitting Company of the same class, and that said defendant received said payment with full knowl-

edge or with reasonable cause to believe that such payment was intended as a preference to said defendant.

Your orator, further complaining, says that said payment so made as aforesaid to defendant did enable the defendant to receive a greater percentage of its claim against the said Newport Knitting Company than other creditors of the same class could procure, and this was well known to said defendant at the time it received such payment.

Forasmuch as your orator can have no adequate relief at
4 law, he demands that said payment so made as aforesaid by said Newport Knitting Company to said defendant on or about the 26th day of September, 1903, be adjudged a preference to said defendant within the meaning of the laws of the United States in such case made and provided, and that said defendant be decreed to account to your orator for said property so transferred to it as aforesaid.

May it please your honors to grant to your orator a Writ of Subpœna of the United States of America directed to said defendant commanding it on a day certain to appear and answer unto this bill of Complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper, and required by the principles of equity and good conscience.

COOKINHAM & COOKINHAM,
*Solicitors for Complainant*, 81 *Genesee St.*,
*Utica, New York.*

NORTHERN DISTRICT OF NEW YORK,
*Oneida County* ss:

Charles B. Mason, being duly sworn, says he is the complainant in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge except as to the matters which are therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

CHAS. B. MASON.

Sworn to before me this 8th day of August, 1907.

JOHN MILLER,
*Notary Public, Oneida County, N. Y.*

(Endorsed:) Amended Bill of Complaint.—Filed Aug. 8, 1907. —W. S. Doolittle, Clerk.

5 The President of the United States of America to the National Herkimer County Bank, Greeting:

You are hereby commanded that you personally appear before the Judge of the District Court of the United States for the Northern District of New York, in the Second Circuit, on the first Monday of August, 1907, to answer to a Bill of Complaint exhibited against you in said Court by Charles B. Mason as Trustee in Bankruptcy of the Newport Knitting Company, and to do further and receive whatever said Court shall have considered in that behalf, and this you are not to omit under the penalty of two hundred and fifty dollars.

Witness, the Honorable George W. Ray, Judge of the District Court of the United States for the Northern District of New York, at the City of Utica, in said Northern District, the Twentieth day of June, one thousand nine hundred and seven.

W. S. DOOLITTLE, *Clerk.*

COOKINHAM & COOKINHAM,
*Solicitors for Complainant.*

*Memorandum.*

The defendant is to enter his appearance in the suit above mentioned, in the Clerk's Office, at Utica, on or before the day at which the above subpœna is returnable, otherwise the bill may be taken pro confesso.

W. S. DOOLITTLE, *Clerk.*

*Return on Service of Writ.*

UNITED STATES OF AMERICA,
*Northern District of New York, ss:*

I hereby certify and return that I served the annexed equity subpœna on the therein named The National Herkimer County Bank by handing to and leaving a true and correct copy thereof with George D. Smith, Cashier of Deft. bank, personally at
6 Little Falls, N. Y., in said District on the 21st day of June, A. D. 1907.

C. D. MACDOUGALL,
*U. S. Marshal.*
By WM. H. REESE, *Deputy.*

*Marshal's Fee.*

| | |
|---|---|
| Fee | $2.00 |
| Mileage | 1.32 |
| | $3.32 |

(Endorsed:) Equity Subpœna. Filed July 1, 1907. W. S. Doolittle, Clerk.

United States District Court, Northern District of New York.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company,
vs.
NATIONAL HERKIMER COUNTY BANK.

To W. S. Doolittle, Esq., Clerk of the District Court of the United States for the Northern District of New York:

You will please enter my appearance for the defendant National Herkimer County Bank in the above entitled suit.

Yours, &c.,

MYRON G. BRONNER,
*Solicitor for the Defendant.*

Office and Post Office Address, Nos. 5 & 7 Journal & Courier Bldg., Little Falls, N. Y.
Dated June 24, 1907.

(Endorsed:) Notice of Appearance. Filed June 25, 1907. W. S. Doolittle, Clerk.

7 District Court of the United States, Northern District of New York.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company,
vs.
NATIONAL HERKIMER COUNTY BANK.

The Answer of the Defendant, National Herkimer County Bank of Little Falls, in the Bill Called the National Herkimer County Bank, to the Amended Bill of Complaint of the Above-named Plaintiff:

First. The defendant admits that the complainant is a resident of the Northern District of New York, and also that the defendant is a domestic corporation located at Little Falls in said Northern District of New York; admits that a petition was duly presented to this Court on or about the 30th day of December, 1903, asking that the Newport Knitting Company be adjudged a bankrupt, and that after a hearing on said petition said Court made an order on the 23rd day of January, 1904, adjudging said Newport Knitting Company a bankrupt, and that in said proceeding the complainant was duly appointed Trustee in Bankruptcy on the 24th day of February, 1904, and that he duly qualified and gave the required bond, and has ever since been and is now acting in said capacity.

Second. The defendant, further answering said bill of complaint, denies, upon information and belief, that for more than six
8 months prior to the 30th day of December, 1903, the said Newport Knitting Company was insolvent and unable to pay its debts; denies that said company was indebted to this defendant in the sum of Five Thousand Dollars at the time of filing said petition in bankruptcy, and had been for about four months theretofore; denies that said Newport Knitting Company, within the period of four months prior to December 30, 1903, and on or about the 26th day of September, 1903, paid to this defendant the sum of Five Thousand Dollars in money belonging to said Newport Knitting Company; denies that said payment was made to this defendant with intent to prefer this defendant, and that this defendant had full knowledge at the time of such payment that said Newport Knitting Company was insolvent within the meaning of the laws of the United States relating to Bankruptcy, or that it had reasonable cause to believe the said Newport Knitting Company insolvent and unable to pay its debts, and that the said payment was made with an intent to prefer this defendant over other creditors of said Newport Knitting Company, and to enable this defendant to receive a larger proportion-

ate amount of money upon its indebtedness than could be received by any of the other creditors of said Newport Knitting Company of the same class; and that this defendant received said payment with full knowledge or with reasonable cause to believe that said payment was intended as a preference to this defendant; denies that the payment alleged in said bill of complaint to have been made to this defendant enabled the defendant to receive a greater percentage of its claim against the said Newport Knitting Company than other creditors of the same class could procure, and that this was well known to the defendant at the time it received said alleged payment; denies that the complainant can have or has no adequate remedy or relief at law.

9 Third. Denies each and every other allegation in said bill of complaint not hereinbefore admitted or denied.

Fourth. The defendant, for further answer to said bill of complaint, alleges that the plaintiff herein has an adequate remedy at law for damages against this defendant, who is financially solvent and able to respond in damages for any claim herein that he may establish against it, and that said plaintiff cannot maintain this action in equity by reason of such fact.

THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS, N. Y.
By D. H. BURRELL, *President.*

[L. S.]
Attest:
GEO. D. SMITH, *Cashier.*

MYRON G. BRONNER,
*Solicitor for Defendant.*

Office and Post Office Address, Nos. 5 & 7 Journal & Courier Bldg., Little Falls, N. Y.

STATE OF NEW YORK,
*County of Herkimer, City of Little Falls, ss:*

David H. Burrell, being duly sworn, deposes and says: I am the president of the National Herkimer County Bank of Little Falls, the above named defendant; so much of the foregoing amended answer as concerns my own acts and deeds and of the acts and deeds of said National Herkimer County Bank of Little Falls is true to the best of my own knowledge, and so much thereof as con-
10 cerns the acts and deeds of any other person or persons I believe to be true.

D. H. BURRELL.

Subscribed and sworn to before me this 27th day of September, 1907.

T. R. BURNES,
*Commissioner of Deeds, Little Falls, N. Y.*

(Endorsed:) Amended answer Filed Sept. 28, 1907. W. S. Doolittle, Clerk.

At a Term of the District Court Held in and for the Northern District of New York, in the Village of Norwich, on the 26th Day of September, 1908.

Present: Hon. George W. Ray, one of the Judges, Presiding.

United States District Court, Northern District of New York.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company,
against
THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.

The above-entitled cause having been regularly upon the calendar at said term of the Court, and the Court having read the testimony and heard the arguments of counsel therein, and having
11 made and filed its decision by which it finds in favor of the complainant and against the defendant, and that the payment to the bank on the 26th day of September, 1903, of the sum of four thousand nine hundred and fifty-three dollars and forty-three cents ($4,953.43) was a preferential payment, and that the said bankrupt Newport Knitting Company was at the time of said payment insolvent, and that the said defendant knew, or had reasonable cause to believe, such to be the fact, and that said payment was intended as a preferential payment and voidable by said trustee in bankruptcy.

Now, therefore, on motion of Cookinham & Cookinham, Solicitors for complainant,

It is ordered, adjudged and decreed that the said payment by the said Newport Knitting Company to the said defendant, through the Titus Sheard Company of the said sum of four thousand nine hundred fifty-three dollars and forty-three cents ($4,953.43), on said 26th day of September, 1903, be, and the same is, hereby set aside, declared null and void, and that the said complainant recover of the said defendant said sum of four thousand nine hundred fifty-three dollars and forty-three cents ($4,953.43), with interest thereon from the said 26th day of September, 1903, amounting to the sum of fourteen hundred eighty six 03 100 dollars in all, the sum of six thousand four hundred thirty-nine 46 100 dollars, together with the costs of this suit to be taxed by the Clerk, and inserted in the judgment, viz.: $193.75, making a total of $6,633.21.

(Enter.)

GEO. W. RAY, *U. S. Judge.*

Filed, entered and docketed this 28th day of Sept., 1908, at eleven o'clock a. m.

W. S. DOOLITTLE, *Clerk.*

(Endorsed:) Decree. Filed Sept. 28, 1908. W. S.
12 Doolittle, Clerk. Endorsement on cover: Case No. 37. United States District Court, Northern District of New York. Charles

B. Mason, as Trustee in Bankruptcy of the Newport Knitting Company, vs. The National Herkimer County Bank of Little Falls. Final Record. Cookinham & Cookinham, Solicitors for Complainant, Office and P. O. Address, 81 Genesee St., Utica, N. Y. Damages 4,953.43, Interest 1,486.03, Costs 193.75, Judgment 6,633.21. Filed, entered and docketed Sept. 28, 1908, at 11 a. m. W. S. Doolittle, Clerk.

District Court of the United States, Southern District of New York.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company,

vs.

THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.

*Testimony taken before William E. Searey, Notary Public, at his office in the City of Utica, N. Y., the 22d day of October, 1907, at 10 o'clock a. m.*

Appearances:

Henry J. Cookinham, for Complainant.
Myron G. Bronner and A. M. Mills, for Defendant.

EDWIN I. STINSON, called by Complainant, and being duly sworn, testified as follows:

M. G. BRONNER: The defendant renews the objection stated
13 in his answer that the plaintiff has an adequate remedy at law for damages, if any, sustained by him.

H. J. COOKINHAM:

1 Q. Mr. Stinson, where do you live, and what is your present occupation?

A. Little Falls, N. Y. Manufacturer of knit goods.

2 Q. Were you formerly connected with the Newport Knitting Co. of Newport N. Y., and, if so in what capacities?

A. I was, as secretary of the Company, director and bookkeeper.

3 Q. As secretary, did you have charge of and keep the books of the Company?

A. Not as secretary; I did as bookkeeper.

4 Q. As secretary, you kept the record book of the Company?

A. Yes.

5 Q. I show you a book, and ask you whether or not that is the record book of the Company, showing transactions of the stockholders' meetings and meeting of the Board of Directors of the Company?

A. It is.

6 Q. Does this book also contain a certified copy of the Articles of Incorporation of the Company?

A. It does.

Mr. COOKINHAM: I offer in evidence a certified copy of the Articles of Incorporation of the Newport Knitting Co.

Received and marked Complainant's Exhibit 1.

7 Q. Did you keep the minutes of the stockholder's meeting for the year 1901 and 1902, as they appear in this record book?

A. I did.

8 Q. Can you state from memory who was elected directors of the Company at the annual meeting in 1901 and 1902?

A. Yes.

9 Q. You may state them?

A. Titus Sheard, Frank Senior, H. P. Snyder, E. I. Stinson and O. N. Purdy.

10 Q. What relationship, if any, did you bear to Titus Sheard?

A. Son-in-law.

11 Q. Did any of the other directors bear relationship to Titus Sheard; if so, who and what relationship?

A. Frank Senior, nephew. That's all.

12 Q. The capital stock of the Newport Knitting Co. was $30,000, was it not, divided into shares of $100 each?

A. Yes.

13 Q. Will you state how that stock was paid?

M. G. BRONNER: I object, as incompetent, improper and immaterial.

A. I can't remember.

14 Q. Were you examined before Wm. H. Comstock, Referee in Bankruptcy, in the bankruptcy proceedings of the Newport Knitting Company?

A. I was.

15 Q. Do you remember stating there how the stock was paid?

A. No, I do not.

16 Q. You kept the books of the Company that showed how the stock was paid, did you not?

A. I don't remember.

17 Q. I show you a lot of books upon the table before the Notary, and ask whether or not they are the books of the Newport Knitting Co. kept by you?

A. I can't say I kept all of the books, a majority I did.

18 Q. In what book would it appear, or does it appear how the stock was paid for?

A. In the journal.

19 Q. How much was paid for in cash, and by whom?

A. M. MILLS: I object to that, incompetent, immaterial, does not appear that the witness knows.

A. I don't know without referring to the book.

20 Q. Can you tell by referring to the book how much was paid in cash, and by whom it was paid?

A. M. MILLS: We object to the proposed testimony as to the payment of stock, on the ground that it is incompetent, hearsay and the witness does not speak from knowledge.

A. $15,000—$5,000 by O. N. Purdy, $5,000 by O. N. Purdy, $5,000 by O. N. Purdy.

21 Q. Do you understand the entries that you are looking at in the journal sufficient to state whether they indicate how much of the stock was paid for in money?

A. Mr. Purdy paid $10,000 in two different payments.

22 Q. Do you know of any other stockholder in the Company who paid cash for their stock; if so, name him?

M. G. BRONNER: Objected to. Incompetent, improper and immaterial.

Overruled. Harmless in view of answer. Exception.

A. I don't remember.

23 Q. How much stock did you have in the Company?

A. I think it was 25 shares.

24 Q. What did you pay for it?

A. I gave my note for it.

Objected to as incompetent, improper and immaterial.

25 Q. To whom did you give the note?

A. Titus Sheard.

26 Q. Then you never paid anything to the Co. for the stock which had been issued to you?

A. No, sir.

27 Q. Are there any books of the Newport Knitting Co. which show to whom the certificates of stock were issued?

A. Yes.

28 Q. Was not more than one certificate for stock issued to you?

A. Yes, sir.

29 Q. How many and for what number of shares?

A. One for 20 and one for 25 shares.

30 Q. Then, certificates for 45 shares were delivered to you?

A. Yes, sir.

31 Q. Did you pay anything for the 20 shares that were issued to you besides the 25?

A. No, sir.

32 Q. What were the number of the certificates of stock
16 issued to you and the amounts?

A. No. 9, 25 shares; No. 10, 20 shares.

33 Q. How many shares were issued to Titus Sheard?

A. The same number—No. 3, 25 shares; No. 4, 20 shares.

34 Q. How many to Mr. Senior, and give the number of the certificates?

A. No. 5 for 25 shares, No. 6 for 20.

35 Q. How many to Mr. Snyder?

A. No. 7, 25 shares to Homer P. Snyder; No. 8, 20 shares to Homer P. Snyder.

36 Q. How many to Mr. Purdy?

A. No. one, 100 shares to O. N. Purdy.

37 Q. Who else had stock issued to them?

A. No. 2, W. Walker, 20 shares.

38 Q. So far as you know, Mr. Stinson, did any of these stockholders that you have named, except Purdy, pay cash for their stock?

A. No.

39 Q. Do you know how these respective stockholders paid for the 25 shares issued to them by certificates for that amount?

A. Paid in merchandise, machinery and supplies.

40 Q. Will you state just what that transaction was?

A. I couldn't state it, irrespective of the entries in the books.

41 Q. Don't you know that it was paid for by machinery, supplies and merchandise from the K. P. Snyder Co.

A. It was, as I remember it; yes.

42 Q. Do you know of what that machinery, merchandise and supplies consisted?

A. No.

43 Q. Is there any entry upon the books of the Newport Knitting Co. giving in detail just what this property was for which the $10,000 represented by the 4 certificates of $2,500 each was issued?

A. No.

44 Q. Did you ever see while you were in charge of the books of the Newport Knitting Co. a statement in detail, showing exactly what the property was for which this particular $10,000 of stock was issued?

A. I can't recall that I did; it should be in the bills.

17 45 Q. Are the bill books of the Newport Co. now on the table before you?

A. No, sir.

46 Q. Did the Company keep a book in which was entered in detail such machinery, merchandise and supplies as the Co. purchased?

A. Not a book.

47 Q. How did the Co. keep a record of such machinery, supplies and merchandise as it purchased?

A. The original bills were filed in a file.

48 Q. Where were these original bills filed?

A. Newport Knitting Co.'s office, on a shelf above the desk.

49 Q. Were there any particular pigeon holes, or other receptacles particularly for keeping these original bills; if so, what were they?

A. In the ordinary office files.

50 Q. And were these kept in such ordinary office files?

A. They were, as I recollect it.

51 Q. Where are those files at the present time?

A. I don't know.

52 Q. Where did you last see them?

—. I can't say.

53 Q. Don't you remember where you last saw them?

A. My recollection would be that they were given to Mr. Mason.

54 Q. You never took them away from the office in Newport?

A. No.

55 Q. Do you know of any other person taking these original bills away from the Newport Office of the Newport Knitting Co.?

A. I do not.

56 Q. Where were the books of the Newport Knitting Co. kept?
A. They were kept at Newport until July, 1901.
57 Q. Then, where were they kept?
A. They were kept by me in the office of the Titus Sheard Co., Little Falls, N. Y.
58 Q. Who kept them while they were at the office of the Newport Knitting Co. in Newport?
A. Weyman Walker.
59 Q. Where is he?
A. I do not know.
60 Q. Where did you last hear of him?
A. Somewhere in Long Island, but the town I don't know.
61 Q. What did the office of the Titus Sheard Co. in Little
18 Falls consist of?
A. Two rooms, one on one side of the entrance and one on the other.
62 Q. And who occupied these respective rooms?
A. The one at the right was occupied by Titus Sheard as a private office, I mean the left, going in. On the right going in was occupied by the bookkeeper of the Titus Sheard Co., S. M. Smith.
63 Q. And this condition of affairs existed all the time from the reception of the books of the Knitting Co. down to its failure?
A. Yes.

Offered in evidence certified copy of the incorporation of the Titus Sheard Co.

M. G. BRONNER: Objected to as incompetent and immaterial.
Overruled. Exception.
Received and marked Complainant's Ex. 2.

64 Q. What connection, if any, did you have with the Titus Sheard Co. at the time the books of the Newport Knitting Co. were received at the office in Little Falls?

Objected to as incompetent, improper and immaterial. Overruled. Exception.

A. Secretary and a director.
65 Q. As secretary of the Titus Sheard Co. did you keep the record book of that company?
A. Yes, sir.
66 Q. Who were the officers and directors of that company?
A. Titus Sheard, president; Frank Senior, treasurer; E. I. Stetson, secretary. Directors were the same.
67 Q. Who had general charge of the business of the Titus Sheard Co.?
A. Mr. Senior was general manager.
68 Q. Who had general charge of the Newport Knitting Company?
A. Mr. Senior.
69 Q. So that the transactions between those two companies, Mr. Senior acted on both sides, did he?

Objected to as incompetent, improper and immaterial, and
19 calls for a conclusion and not for a fact. Witness should describe what actually occurred. Overruled. Answer gives a fact. Exception.

A. No transactions occurred between them without Mr. Senior, Mr. Sheard and Mr. Snyder.

70 Q. Do you mean to say that in regard to every transaction between these companies?

A. All of any importance.

71 Q. So that Mr. Senior and Mr. Snyder and Mr. Sheard took part in all the important transactions between the two companies?

A. Yes, sir.

72 Q. Does the books of the Newport Knitting Co. show what real estate was owned by that Company in 1902 and 1903?

A. No, sir; not in detail.

73 Q. It simply shows the word, real estate and then a valuation placed upon it, does it not?

A. Yes, sir.

74 Q. During the year 1903 did the Company own any real estate except its plant at Newport?

A. No real estate.

75 Q. Did it own any tangible personal property at that time, except that which was in the plant at Newport?

A. No.

76 Q. Did you during that year, prior to the failure of the Company, have goods on commission, or in transit to any considerable amount?

A. Not on commission.

77 Q. By "Transit" you mean that you had purchased certain merchandise, and that it might be on its way to the Newport Co.

A. Yes, sir.

78 Q. Such property was purchased, if there was any, upon credit, was it not?

A. Yes.

79 Q. Is there anything in the books of the Newport Knitting Co. which shows specifically what property was owned by the Co. during the year 1902 or 1903, or either one of the years in detail?

A. Nothing in detail.

80 Q. Did the company meet with any financial losses in the year 1902 or 1903, or either of them?

Objected to as incompetent, improper and immaterial. Overruled. Exception.

20 A. Not any that I heard of.

81 Q. To whom did the company sell its goods?

A. Sold through Critten, Clift & Co.

82 Q. They were the sole agents, were they not, of the Company?

A. Yes, sir.

83 Q. Did they also sell to the Titus Sheard Co.?

A. Yes, sir; through Critten, Clift & Co.

84 Q. What goods was sold to the Titus Sheard Co.?

A. Knit goods.

85 Q. If goods were sold to the Titus Sheard Co., did Critten, Clift & Co. receive their commission upon them; if so, what was the commission?

A. 5%.

86 Q. In the year 1903, during the month of September, can you state how the accounts stood between the Newport Knitting Co. and the Titus Sheard Co.?

A. Only by referring to the ledger.

87 Q. Titus Sheard is dead, is he not?

A. Yes, sir.

88 Q. When did he die?

A. April 13, 1904.

89 Q. What became of the books of account of the Titus Sheard Co.?

A. Most of them are in Little Falls, in possession of the Rex Knitting Co.

90 Q. How did the Rex Knitting Co. become possessed of the Titus Sheard Co. books?

A. Simply because they laid there.

91 Q. The Rex Knitting Co. is the successor to the Titus Sheard Co. of Little Falls?

A. Rex Knitting Co. is an entirely new Co., it had nothing to do with being successor of the Titus Sheard Co.

92 Q. The Rex Knitting Co. occupies the same premises and offices that was formerly occupied by the Titus Sheard Co., does it not?

A. Yes, sir.

93 Q. Are you able to state what the indebtedness of the Newport Knitting Co. was in September, 1903?

A. No, sir, but might from the books. No, sir.

94 Q. Do the books of the Newport Knitting Co. show what that Co. owed during the year 1903 up to and including the month of September of that year?

21 A. The only thing it would show would be the last statement; that would not be up to that time.

95 Q. The indebtedness of the Newport Knitting Co. in some way appears upon its books of account, does it not?

A. No, sir.

96 Q. What portion of the indebtedness of the Newport Co., during the year 1903, including the month of Sept., appear upon the books of the Company?

A. M. MILLS: Objected to as incompetent, immaterial, irrelevant. Overruled, as answer is harmless. Exception.

A. No unpaid bills were entered until they were paid. Notes payable.

97 Q. The notes payable appeared upon the books, and in what books?

A. In the notes payable book.

98 Q. And the entries were made in that book?

A. Yes, sir.

99 Q. And correctly made?

A. Yes, sir.

100 Q. Then, whatever the Company owed outside of notes or drafts payable, would not appear upon any of the books of the Company?

A. No, sir.

101 Q. How would the indebtedness of the Company for the year 1902, and down to the time of its failure, appear by anything in the office of the Company?

A. It would appear by the sum total of the notes payable and the bills on file, unpaid.

102 Q. How would the amount due for labor appear upon the books, or any other paper in the office of the Company?

A. Weekly it would appear in the time book.

103 Q. Can you tell by referring to the time book how much was due for labor during the month of September, 1903?

A. Yes.

104 Q. State it.

M. G. BRONNER: Objected to as incompetent, improper and immaterial.

22 A. Time was kept by Weyman Walker—$259 for Sept., 1903, appears here.

105 Q. The mill then was *was* not in full operation?

A. No.

106 Q. How long at that time had the mill been only running partially?

A. During the month of September.

107 Q. What was the occasion of its being only run partially?

Objected to as incompetent, immaterial and irrelevant, speculative, and an opinion.

A. I don't know, I am sure.

108 Q. The mill never started up again to run fully, did it?

A. No, sir.

109 Q. When was the mill finally shut down?

A. October. The week of October 10, 1903.

110 Q. Do you know why it was shut down?

A. I do not know.

111 Q. Did you have anything to do with the closing down of the mill?

A. No, sir.

112 Q. Who did have to do with that matter?

A. Mr. Sheard, Mr. Senior and Mr. Snyder.

113 Q. Did they have a conference in regard to it?

A. I don't know; I suppose they had several.

114 Q. When did you first know of their having a conference in regard to that matter?

A. I couldn't recall.

115 Q. Do you know whether or not they did have a conference with reference to that matter sometime during the year 1903?

A. They undoubtedly did.

Mr. MILLS: I object to that answer. Objection withdrawn.

116 Q. When first did any such conference take place?
A. I do not know.
117 Q. Do you remember the payment of note of about $5,000 to the National Herkimer County Bank of Little Falls?

Objected to; incompetent, improper and immaterial, no
23 foundation laid; it does not appear that any such payment was made, or that any such note existed, or that the *the* witness had any personal knowledge of any such transaction. Overruled. Exception.

A. I do remember.
118 Q. Will you look at the note book of the Newport Knitting Co. and see if you can identify the note?
A. Yes.
119 Q. Just state what date of the note was, to whom it was made payable and where?

Objected to that it calls for the contents of a book which is the best evidence, and not for the recollection of the witness; incompetent and improper. Overruled. Exception.

A. —.
120 Q. Do you know where that note is?
A. I do not.
121 Q. You haven't it in your possession?
A. No.
122 Q. Have you ever seen it since it was given?
A. No.
123 Q. Can you state who signed the note on behalf of the Newport Knitting Co.?
A. Yes, sir.
124 Q. Who was it?

Objected to, not the best evidence. Overruled. Exception.

A. Signed by O. N. Purdy, Treasurer, per E. T. Stinson and Titus Sheard, per Frank Senior. I don't quite remember about Frank Senior.
125 Q. And where was it payable?
A. At the National Herkimer County Bank.
126 Q. And what was the amount?
A. $5,900.
127 Q. And what was the time?
A. Aug. 22, 1903.
128 Q. For how many months?
A. 3 months.
129 Q. To whose order was it made payable?

Objected to as incompetent and immaterial, and not the best evidence. Overruled. Exception.

24 A. Titus Sheard Co.
130 Q. Was it endorsed by that company?

Same objection.

A. Yes, sir.

131 Q. Do you know where it was discounted, and when?
A. At the National Herkimer County Bank. It was a renewal.
132 Q. Do you know when the note was discounted?
A. Aug. 22nd, 1903.
133 Q. Do you know who took it to the bank to be discounted?
A. I do not know.
134 Q. Did you do it?
A. I can't recall that I did.
135 Q. Who made the entries concerning this note on the book of the Newport Knitting Co.?

Objected to as incompetent and immaterial. Overruled. Exception.

A. I made those entries.
136 Q. And from whom did you procure the information to enable you to make the entries?
A. My own knowledge. It was my business to keep them renewed.
137 Q. So then you have personal knowledge of the fact that this note was renewed on the date that you have given?
A. Yes, sir.
138 Q. Are you able to state what day it was paid to the defendant?

Objected to; incompetent; immaterial; it appears that the witness has no personal knowledge of the transaction. Overruled. Exception.

A. Sept. 26, 1903.
139 Q. And how much was paid?
A. $5,000, and cannot tell whether interest was paid or not.
140 Q. You remember the fact of its being paid?

Objected to on the ground that it is incompetent, immaterial, and assumes that the witness had personal knowledge of transaction of paying this note. Overruled. Exception.

25 A. I remember of its being paid.
141 Q. Did you have a consultation with Mr. Sheard about the payment of this note before it was paid?
A. No, not any personal conversation.
142 Q. Do you know whether or not there was any conference between the officers of the Newport Knitting Co. and the Titus Sheard Co. with regard to the payment of this note before it was paid?
A. No.
143 Q. This note would fall due Nov. 22, 1903?
A. Yes, sir.
144 Q. Do you know how this note was paid?
A. Yes, sir.
145 Q. How?
A. It was paid by the Titus Sheard Co. check.
146 Q. Given to the defendant?
A. Yes.
147 Q. How did the Newport Knitting Co. receive a benefit from the payment of that note?

Objected to, incompetent, improper and immaterial. Overruled Exception.

A. This Titus Sheard Co. was owing the Newport Knitting Co. a large sum of money.

— Q. The Titus Sheard Co. had discounted the note at the National Herkimer County Bank of Little Falls and received the avails of it; on the 26th day of Sept., 1903, the Titus Sheard Co. gave its check to the bank for the note, and the Titus Sheard Co. charged the same amount to the Newport Knitting Co.

Objected to, incompetent, improper and immaterial, grossly leading and suggestive, and states the result of his reason instead of the facts. Overruled. Exception.

A. Yes.

149 Q. Do the books of the Titus Sheard Co. show how much it owed the Newport Knitting Co. at that time?

Objected to, incompetent and improper. Overruled. Exception.

26 A. Undoubtedly they do.

150 Q. Do the books of the Newport Knitting Co. show the condition of the accounts between that Co. and the Titus Sheard Co. on the 26th day of September, 1903.

Objected to on the same grounds. Overruled. Exception.

A. Yes, it does show.

151 Q. Can you state from the Newport Knitting Co.'s books, which were kept by you, what the condition of the accounts were between that Co. and the Titus Sheard Co. on the 26th day of Sept. 1903?

A. It don't show, but it can be figured out from the sales account and the purchase account.

152 Q. Does this item of the payment of this $5,000 note to the defendant appear in the account on the books of the Knitting Co.?

A. Yes, sir.

153 Q. State how it appears, and how much was credited?

Objected to as incompetent, improper and immaterial. Overruled. Exception.

A. On the 25th of Sept., 1903, there was credited to the account of the Titus Sheard Co. on the books of the Newport Knitting Co. $4,953.33.

154 Q. Does that represent the payment of the note?

A. Yes, sir.

155 Q. How do you account for its not being to the full $5,000?

Objected to as incompetent, immaterial and irrelevant. Witness can't speculate about it. Overruled. Exception.

A. Interest account is credited to $46.67.

Mr. BRONNER: I move to strike out the answer on the ground stated in the objection, and upon the further ground that it appears

that the witness is testifying, not from his recollection or
27 knowledge, but from unidentified and unestablished entries in some book or paper before him.

Motion denied. Exception.

156 Q. Have you a recollection aside from any book or memorandum how that account was made up?

A. No, sir.

157 Q. The statement that you made above, you made by looking at what?

A. The journal.

158 Q. Was this book kept by you and this entry made by you?

A. Yes, sir.

159 Q. And by refreshing your recollection by examining this memorandum, are you able to state the amounts that made up the $5,000 on the payment of the note, or the sum that was paid to the defendant?

A. Yes, sir; from the book.

Mr. BRONNER: I move to strike out the answer as not being responsive.

160 Q. In your last answer about the book, you mean the book that contains the memorandum made by you concerning the payment of this note, do you not?

A. Yes, sir.

161 Q. Were there other notes of the Newport Knitting Co. paid on that same day that were not due?

Objected to. Overruled. Exception.

A. I don't remember.

162 Q. Can you tell by looking at the note book of the Newport Knitting Co.?

A. I don't see any other notes paid on that same day.

163 Q. Were there several other notes paid about that time which were not due?

Objected to, unless it appears that the defendant had some knowledge or notice of the transactions called for. Overruled. Exception.

A. I see one paid about that time or the day before.

28 164 Q. What was that?

Objected to on the same ground as the last. Overruled. Exception.

A. One small note of $1,495.00 to H. P. Snyder Mfg. Co.

165 Q. Up to the 26th day of Sept., 1903, had any salary been paid to Titus Sheard?

A. Salary had been credited to him.

166 Q. Had it been paid to him?

A. No, sir.

167 Q. Was his salary ever paid to him?

A. It was paid on the 27th of September, 1903.

168 Q. How much was it?

A. $760.00.

169 Q. Were the salary of the other officers paid before that day?

A. Every month or every quarter.

170 Q. Do you know who went to the bank to pay this note held by the defendant?

A. No, I do not.

171 Q. What officer of the Titus Sheard Co. had charge of the financial affairs of that Co.?

A. The president, Mr. Sheard.

172 Q. Did you see this $5,000 note after it was paid by the Titus Sheard Co.; if so, when and where?

A. I can't remember that I saw it.

173 Q. Will you look at all of the books on the table and see if you can remember any other books kept by the Newport Co. than those which now lie upon the table?

A. I can't recall any other book.

Mr. COOKINHAM: I offer for identification, and ask that it be marked for identification A.

Ledger shown witness, and marked Ex. B for iden.

Journal shown witness, and marked Ex. C for identification.

Notes Payable book, and marked Exhibit D for identification.

Check Register, marked Ex. E.

Bill Book, Ex. F for identification.

Bill Book, Ex. G for identification.

Bill Book, Ex. H for identification.

29 Bill Book, Ex. I for identification.

Bill Book, Ex. J for identification.

Bill Book, Ex. K for identification.

Bill Book, Ex. L for identification.

Note Book, Ex. M for identification.

Stock Certificate Book, Ex. N for identification.

Time Book, Ex. O for identification.

Time Book, Ex. P for identification.

Order Book, Ex. Q for identification.

Order Book, Ex. R for identification.

Index Book to the Time Books, Ex. S for identification.

Pass Bank Books to the National Bank of Newport, Ex. T for identification, and U.

Books marked V, W, X and Y for identification, he does not identify.

Stubs of the check book marked Z for identification.

Mr. COOKINHAM: I offer "Regulation III for Officers."

Mr. BRONNER: Objected to as incompetent, improper and immaterial.

Received and marked Exhibit 3.

The regulation is as follows:

I. The Officers of the Company shall consist of a President, Vice-President, General Manager, Secretary and Treasurer, and such other officers as the Board of Directors shall from time to time decide upon. Whose terms of office shall be until the next Annual meeting and until their successors are elected.

II. The President shall be the executive officer of the Company, and shall exercise general control over all its affairs and officers, and shall have power to call special meetings of the Board of Directors at such times and such places as may be designated by him.

He shall preside at all meetings of the Board of Directors when present and promote the regular and speedy transaction of business. He shall see that the Regulations of the stockholder and the by-laws, rules and regulations of the Board of Directors are faithfully executed. He shall see that all yearly and all other reports required by the laws of the state are duly prepared, printed and transmitted to the proper officers.

He shall prepare an annual report and submit the same to the Board of Directors at its annual meeting which shall be held on the day of the annual meeting of the stockholders of the Company at the general Office of the Company and preceding such stockholders' meeting.

In case a vacancy occurs in the Office of President the same shall be filled by the Board of Directors without unnecessary delay.

III. The signature of both the President and the Treasurer shall be necessary upon all checks, notes or any other financial obligation that may be executed or used in the transaction of the business of the Company. Either may endorse, however, for the bank deposit only for the credit of the Company.

IV. In the case of the absence, death or other disability of the President, the Vice-President shall exercise the same powers and perform the same duties as properly and legally belong to the Office of President, including that of signing checks, notes or other financial obligations which shall be performed by the Vice-President who shall sign the President's name, not his own.

In the absence, death or disability of the Treasurer, the Secretary shall exercise the same power and perform the same duties as properly and legally belong to the office of the Treasurer, including that of signing checks, notes or other financial obligations which shall be performed by the Secretary who shall sign the Treasurer's name, not his own.

V. The Vice-President and General Manager shall have general supervision of the plant and manufacturing and employés and shall have power to negotiate all contracts, and sign all agreements as ordered by the President or Board of Directors and shall give his personal attention to the business.

VI. The Treasurer and Secretary shall perform such other duties usually devolving on such offices and all such other duties as may be assigned to them respectively by the President or the Board of Directors, in the regulation of its officers or otherwise.

VII. The Offices of the Company herein above named shall be elected by the Board of Directors by ballot or otherwise, and such other officers and agents, as the board may determine upon, may be elected or appointed from time to time.

VIII. The compensation of Officers chosen by the Board of Directors shall be determined by the Board.

174 Q. How did the Newport Knitting Co. receive title to the real estate that is owned at Newport?

A. I do not know.

175 Q. You have never known specifically what machinery the Knitting Co. had — you?

A. No, sir.

176 Q. Can you tell what amount of the bills or accounts receivable of the Newport Knitting Co. were on the 26th of September, 1903?

A. I cannot.

177 Q. Can you tell by reference to the books?

A. That could be determined by going through the ledger.

178 Q. Were there many accounts on the ledger of either bills or accounts receivable?

A. Not many.

179 Q. Are there any accounts for goods sold except as
32 against Critten, Clift & Co. and the Titus Sheard Co.?

A. There might be some, I couldn't tell.

180 Q. Was the Newport Knitting Co. on Sept. 26, 1903, or for several months prior to that date, the owner of any notes or bills receivable?

A. Not any, except those that had been deposited in the bank.

181 Q. Were there any moneys due that Company on the 26th day of September, 1903, or for some months before that, except what was due the Titus Sheard Co. and Critten, Clift & Co.

A. I couldn't say, there might have been some.

182 Q. If there were any accounts of that kind, where would they appear upon the books of the Co.?

A. They would appear in the ledger.

183 Q. How much did the Newport Knitting Co. owe all told on the 26th of Sept., 1903, and for two months prior thereto?

A. I couldn't state.

184 Q. Do the books show the amounts?

A. Not entirely.

185 Q. Would the books and the bills against the Co. which had been received, show the entire indebtedness?

A. Yes, it ought to.

186 Q. Was any machinery purchased by the Newport Knitting Co. from any other source than from the H. P. Snyder Co.; if so, what and of whom?

A. There was, but I can't recall what or of whom.

187 Q. What book or papers of the Knitting Co. will show what machinery was purchased by that Company?

A. The paid bills would be the only things to show.

188 Q. Where are the paid bills, if you know?

A. I do not know where they are, unless Mr. Mason has them.

189 Q. You never took these paid bills from the office of the Company, did you?

A. I did not, unless I gave them to Mr. Mason.

190 Q. Where were these bills kept after they were paid?

A. Kept in the file at the office in Newport.

33 191 Q. This Company made a general assignment before bankrupt proceedings were taken, did it not?

A. Not any assignment.

192 Q. Then, a receiver was appointed in the state court before the bankruptcy proceedings were taken?

A. Yes, sir.

193 Q. Who was the receiver in the state court?

A. I was.

194 Q. Did you qualify and take possession of the property?

A. Yes, sir.

195 Q. When were those proceedings instituted and by whom?

A. Middle of October, 1903.

196 Q. And by whom?

A. At the request of the three directors, Mr. Sheard, Mr. Purdy and Mr. Snyder, or Mr. Senior in place of Mr. Snyder.

197 Q. It was a proceeding for the voluntary dissolution of the corporation, was it not?

A. Yes, sir.

198 Q. When did you take possession of the books and property of the Newport Knitting Co.?

A. Immediately on being appointed receiver.

199 Q. What was the date?

A. Oct. 18th, 1903, about.

200 Q. How long did you remain in possession?

A. Some time in January, 1904.

201 Q. You then gave up possession to whom?

A. Mr. Charles B. Mason.

202 Q. As trustee in bankruptcy?

A. Yes.

203 Q. During the time that you were in possession did you give the matter your personal attention?

A. Yes, sir.

204 Q. During that time did you dispose of any property of the Newport Knitting Co.?

A. Yes, sir.

205 Q. How and what was it?

A. Manufactured goods, sold on court order.

206 Q. To what extent did you dispose of such goods?

A. I practically sold all of the manufactured goods, and some of the stock on hand.

207 Q. Did you dispose of them at a fair market price?

34 A. Yes, sir; they were sold at more than they inventoried.

208 Q. Have you any accounts that will show what goods you sold, to whom, and how much you received for them?

A. Yes.

209 Q. Did you receive the pay for these goods?

A. Yes, sir.

210 Q. What did you do with the money?

A. Deposited part of it in the Bank at Newport, and part of it in the National Herkimer County Bank.

211 Q. What next was done with it?

A. I gave Mr. Mason a check for it.

212 Q. You paid out some portion of this money in expenses,

caring for the property and necessary expenses, during the time you were receiver?

A. Yes, sir.

213 Q. Have you an account of that?

A. Yes, sir.

214 Q. Did you give Mr. Mason a copy of your account showing how much money you had paid out?

A. Yes, sir.

215 Q. During the time you were in possession of the property, did you collect accounts or money due the Co. otherwise than for the goods which you sold?

A. Yes, sir. Accounts that were on the ledger.

216 Q. Have you an account of all such moneys?

A. Yes.

217 Q. And did you give Mr. Mason a copy of that account?

A. Yes, sir.

218 Q. Did you receive any money as receiver from any other source than that which I have mentioned?

A. No, sir.

219 Q. Did you pay out any money, except that which appears in your account of which you have given Mr. Mason copies, and for the necessary expenses while you were receiver?

A. No.

220 Q. While you were receiver, was any property belonging to the Newport Knitting Co. removed from its plant, or taken away by anyone, except the property which you sold?

A. Not that I know of.

35 221 Q. Then you turned over to Mr. Mason all the property of the Newport Knitting Co. of every kind, name and nature, except the goods and supplies which you had sold?

A. Yes, sir.

222 Q. Was any property of any kind that was in the possession of the Newport Co. when you took possession, claimed by anyone else—that is, did certain persons claim that property or machinery, that was in the plant of the Newport Co., belonged to them?

A. None that I recall.

223 Q. None of the machinery that had been furnished by the H. P. Snyder Co. was taken back by that Co., was it?

A. Not that I remember.

224 Q. I have concluded the examination of the witness, except in regard to his original statement of goods sold and money received.

Cross-examination by M. G. Bronner:

1 Q. Newport is located how far from Little Falls?

A. 14 miles.

2 Q. How far is it by rail?

A. 22 miles.

3 Q. The plant and factory of Newport Knitting Co. was located at Newport?

A. Yes, sir.

4 Q. Describe the factory in a general way?

A. The factory proper is a three-story frame structure, about 60 ft. wide and 120 ft. long, equipped as a knitting plant, consisting of quite a number of knitting machines and finishing machines of various kinds used in the knitting mill, for the manufacture of ladies' knit underwear. The motor power was water.

5 Q. Where was the factory of the Titus Sheard Co. located?

A. No. 140 W. Main St., Little Falls, N. Y.

6 Q. Was any part of the manufacturing operations of the Newport Knitting Co. carried on at Little Falls?

A. No.

7 Q. Were any of the manufacturing operations of the Titus Sheard Co. carried on at Newport?

A. No.

36 8 Q. Where did the Newport Knitting Co. keep its bank account?

A. At the National Bank of Newport, Newport, N. Y.

9 Q. Where did the Titus Sheard Co. keep its bank account?

A. At the National Herkimer County Bank, Little Falls, N. Y.

10 Q. Where is the National Herkimer County Bank located?

A. South Ann St., Little Falls, N. Y.

11 Q. Has the Titus Sheard Co. ever been dissolved to your knowledge?

A. No, sir.

12 Q. When was the last time that you saw the $5,000 note of the Newport Knitting Co., payable to the order of Titus Sheard Co., dated Aug. 22, 1903?

A. Aug. 22, 1903.

13 Q. In whose possession or hands was it when you saw it last?

A. That I don't remember.

14 Q. When did you make the entry in the bills payable book to which you have referred on your direct examination?

A. The day the note was made, Aug. 22, 1903.

15 Q. After the note was made, was it handed to some officer or agent of the Titus Sheard Co. other than yourself?

A. I think it must have been; I can't recall taking it back myself.

16 Q. Do you know whether it was delivered to the Titus Sheard Co. or not?

A. I don't recall.

17 Q. What was the consideration of that note given by the Newport Knitting Co. to the Titus Sheard Co.?

Objected to as incompetent, immaterial and irrelevant.

A. As I remember, it was to pay for machinery and supplies.

18 Q. You stated on your direct examination that it was a renewal; can you state when the note spoken of was first given?

A. Yes.

19 Q. State when?

Objected to as incompetent, immaterial, irrelevant.

37 A. Sometime in January, 1901.

20 Q. Was that the note that was given for machinery and merchandise to the Titus Sheard Co.?

Objected to the same as last above.

A. Yes.

21 Q. What was the amount of that note originally?

A. Five thousand six or seven hundred dollars.

22 Q. And was it in form the same as the one dated Aug. 22, 1903, except the amount?

A. Yes, sir.

23 Q. Was there a payment made on that note, or one of the same series, and if so, how much and when?

Objected to as incompetent, irrelevant, immaterial.

A. During one of the renewals in the year 1901 the note was reduced to $5,000.

24 Q. Can you state from recollection the amount that the Newport Knitting Co. owed the Titus Sheard Co. at the time when the note you have spoken was given in January, 1901?

A. Not from recollection.

25 Q. Can you state by referring to the account books of the Newport Knitting Co.

A. Yes.

26 Q. Please state the amount of such indebtedness?

Objected to as incompetent, immaterial, irrelevant, and witness not shown competent to answer, as he by the question is compelled to read from the book.

A. $8,272.00.

27 Q. What was the date of that original note, being the first one of the series?

A. Jan. 7th, 1901.

28 Q. What was the exact amount.

A. $5,773.05.

29 Q. When that note was delivered by the Newport Knitting Co. to the Titus Sheard Co. on Jan. 7th, 1901, was it charged
38 against the credit then existing from the Newport Co. to the Titus Sheard Co.?

Objected to as incompetent, immaterial, irrelevant; witness was not the keeper of the books of the Newport Knitting Co. at the time of the transaction, and is testifying from a book and entries not made by himself.

A. Yes, sir.

30 Q. You testified on your direct-examination that the note dated Aug. 22, 1903, was paid on Sept. 26, 1903; did you personally make that payment?

A. No, sir.

31 Q. Do you know of your own personal knowledge where that note was on Sept. 26, 1903?

A. No, sir.

32 Q. What you know about it is derived from information from third person, is it not?

A. Yes, sir.

33 Q. Were the entries which you made on or about Sept. 26, 1903, in the books of the Newport Knitting Co., concerning the payment of this note, made from information, and at the direction of some third person?

A. Yes, sir.

34 Q. What you testified to on your direct-examination was your understanding of the transaction as derived from information furnished by third person, was it not?

A. Yes, sir.

35 Q. Did you derive any of the information upon which you made the entries of payment on Sept. 26, 1903, from any officer or employee of the National Herkimer County Bank?

Objected to as incompetent, immaterial and irrelevant and not cross-examination.

A. No, sir.

36 Q. ——

By consent, hearing is adjourned to Thursday morning, October 24, 1907, at 10 o'clock A. M.

39 Hearing continued, October 24, 1907, at 10 o'clock A. M.

Same appearances.

Mr. E. I. STINSON, still on stand.

37 Q. At the last hearing you testified on cross-examination that the first note made in January, 1901, was in form the same as the renewal note of August 22, 1903, except the amount; are you correct about that?

A. The only difference the original is a four months' note and the other is a three months' note.

38 Q. Was Homer P. Snyder connected in any way with the Titus Sheard Co. in any of the years 1901 to 1903, inclusive?

A. No, sir.

39 Q. Do you remember when you qualified by giving your bond and taking your official oath as receiver of the Newport Knitting Co.; and if so, state when it was?

A. I can't remember the exact date.

40 Q. Did you remember at the last hearing when you stated it was about the 18th of October, 1903?

A. That was as near as I could remember it.

41 Q. Didn't you state to me a few days ago that it was about the 28th of October, 1903?

A. What I said in reference to that was that I looked up my correspondence and found that the first letter I signed as receiver was on the 28th of October, 1903.

Redirect examination:

1 Q. Were the books of the Titus Sheard Co. kept in the same room as the books of the Newport Knitting Co. at Little Falls?

Mr. BRONNER: Objected to as incompetent, improper and immaterial.

A. They were during the time I had charge of them.

40 2 Q. Was any other note made by the Newport Knitting Co. made payable at the National Herkimer County Bank of Little Falls, except the $5,000 note dated Aug. 22, 1903, and, if so, what notes?

A. No, sir; except those of that series of which this was a renewal.

3 Q. Have you your original account here showing the goods sold by you and the money received by you and paid out while you were receiver of the Newport Knitting Co.?

A. Yes, sir.

4 Q. Are you now able to state how much you received for the goods which you sold as such receiver?

A. Yes, sir.

5 Q. State it?

A. Gross amount, $4,676.48.

6 Q. What did you pay out of that for expenses and disbursements?

A. $1,111.20.

7 Q. And what was the net amount turned over to Mr. Mason, the trustee?

A. $3,372.15.

8 Q. State when you paid that over to Mr. Mason?

A. January 18th, 1904.

9 Q. After you had paid this over to Mr. Mason, was there any property of any kind remaining in you- hands as receiver that belonged to the Newport Knitting Co.?

A. No, sir.

10 Q. State to whom certificates for stock for 20 shares in the Newport Knitting Co. were issued?

A. Edwin I. Etinson, Homer P. Snyder, Frank Senior, Titus Sheard and Weyman Walker.

11 Q. Did any of these persons to your knowledge pay to the Newport Knitting Co. anything for that stock?

Mr. BRONNER: I object it, incompetent, improper and immaterial.

Overruled. Exception.

A. No, sir.

12 Q. Do you wish to make an explanation of your answer to interrogatory of to-day No. 7; if so, please do so?

A. I wish to state the amount received by me as receiver
41 from bills receivable and stock sold, was $4,483.35; amount disbursed, $1,111.20; amount turned over to Mr. Mason in cash, $3,372.15; amount of goods sold, $4,676.48, less goods returned and allowances, $846.61; there are some uncollected accounts which do not appear in these figures, but which appear on the ledger, but they are included in the amount of sales.

13 Q. What became of the Titus Sheard Co.?

Mr. BRONNER: I object to it, incompetent, improper and immaterial.

Overruled. Exception.

A. So far as I know, it is still in existence.

14 Q. Did it fail to pay its debts?

Mr. MILLS: Objected to the same as last, and calls for a conclusion.

Overruled. Exception.

A. None that were not compromised; yes.

15 Q. Mr. Stinson, is there any property that you know of at the present time belonging to the Titus Sheard Co.; if so, what?

Mr. BRONNER: Objected to as incompetent, improper and immaterial.

Overruled. Exception.

A. None that I know of.

16 Q. Is there a claim of the Newport Knitting Co., quite a large amount, against the Titus Sheard Co.?

A. Not that I know of.

17 Q. How was the indebtedness of the Titus Sheard Co. to the Newport Knitting Co. paid?

Mr. BRONNER: Objected to as incompetent, improper and immaterial.

Overruled. Exception.

A. Paid in the ordinary way.

18 Q. State how the account between the Titus Sheard Co. and the Newport Knitting Co. stood when you were appointed receiver of the Newport Knitting Co.?

12

A. I cant' tell.

19 Q. Was there any change in the account between the Newport Knitting Co. and the Titus Sheard Co. after you were appointed receiver?

Mr. BRONNER: I object to it as incompetent, improper and immaterial.

A. Not that I know of.

20 Q. What was due from the Titus Sheard Co. to the Newport Knitting Co. on the 1st of September, 1903?

Mr. BRONNER: I object to it as incompetent and improper and immaterial.

A. $5,139.72. On the 26th of Sept. $8,584.90.

21 Q. And all of that was paid before the Newport Knitting Co. was thrown into bankruptcy?

A. The indebtedness referred to at that time was paid.

22 Q. At the time the Newport Knitting Co. was thrown into bankruptcy there was a small amount due from the Knitting Co. to the Titus Sheard Co., was there not?

A. A small balance due.

23 Q. When you stated that the indebtedness of the Titus Sheard Co. was paid, did you mean it was paid 100 cents on the dollar?

A. I can't recall how the settlements were made.

24 Q. You did not keep the books of the Newport Knitting Co. when the entries were made in the note book, concerning which Mr. Bronner questioned you, did you?

A. Not the original entry.

25 Q. In whose handwriting are the entries concerning which Mr. Bronner asked you, with reference to the original $5,000 note discounted by the defendant?

A. The original note was not $5,000; in the handwriting of Weyman Walker.

26 Q. Then all you know about those entries pertaining to
43 the note referred to before you took charge of the books, is what you see on the note book?

A. Yes, sir.

27 Q. Complainant's counsel moves to strike out answers of the witness to cross-interrogatory 27, 28, 29.

28 Q. Was there any meeting of the directors of the Newport Knitting Co. during the years 1902 and 1903, except a meeting which immediately followed the annual meetings of stockholders in those years?

A. None that I know of.

29 Q. In making the entries in the note book of the Newport Knitting Co., you made them correctly, did you not?

A. Yes sir.

30 Q. In your answer to interrogatory 180 you said, that the Newport Knitting Co. was not the owner of any notes or bills receivable, except those that had been deposited in the bank; what do you mean by the word deposited?

A. Discounted.

31 Q. Can you tell how much cash the Newport Knitting Co. had on hand on the 26th day of Sept., 1903?

A. No, sir.

32 Q. Can you by reference to the books of the Newport Co. kept by you, state the amount of cash which the Company had on hand Sept. 26, 1903?

A. Yes, sir.

33 Q. Can you tell that without reference to the books of that Company kept by you?

A. No, sir.

34 Q. What entry or entries in the books of the Co. enable you to tell?

A. In the check register. Ex. E for identification.

35 Q. State what that amount was?

A. $486.72.

36 Q. Does that mean at the close of business on that day or the beginning?

A. At the close.

37 Q. Does the note book contain entries showing all of the notes given by the Newport Knitting Co.?

A. Yes, sir.

38 Q. Were any notes given by the Co. subsequent to Sept. 26, 1903?

A. No, sir.

39 Q. So far as you know, were any goods or material purchased after Sept. 26, 1903?

A. I do not know.

44 40 Q. Do you know of any indebtedness that was contracted by the Newport Knitting Co. subsequent to Sept. 26, 1903, except for salary of the officers and for labor?

A. Not that I can recall.

Recross-examination by Mr. BRONNER:

1 Q. To whom did you sell goods after you were appointed receiver?

A. Critten, Clifts & Co., F. M. Blystone, I. N. Lovenheim, Little Falls Mfg. Co., Regal Textile Co.

2 Q. And the money you disbursed, what was that for generally?

A. For the expenses of taking care of the plant, labor, insurance, etc.

3 Q. Was the plant of the Newport Knitting Co. at Newport still operating when the application for a receiver was made about the middle of October, 1903?

A. No, sir.

4 Q. When did the operation cease?

A. The week ending Oct. 10th, 1903.

5 Q. Did the operation cease on Oct. 10th, 1903?

A. Yes, sir.

6 Q. Who had charge of the plant at Newport in 1903?

A. W. E. Cahill, superintendent.

7 Q. And was he there in possession of the plant up to the time when the receiver proceedings were started?

A. Yes.

8 Q. Was fire kept under the boilers up until the receiver proceedings were started?

A. Yes, sir.

9 Q. Was there an office at the mill?

A. Yes, sir.

10 Q. Was that kept open until the receivership proceedings?

A. Yes, sir.

11 Q. Who occupied it?

A. Mr. Cahill and Mr. Walker.

12 Q. Were goods shipped out from the mill up to the time of the receivership proceedings?

A. I can't tell without referring to the book.

13 Q. You may refer to the book and tell what goods were shipped out prior to the receivership proceedings?

A. Oct. 17th and 20th, 1903. Oct. 16th, Oct. 15th, Oct. 14th, Oct. 10th, Oct. 8th, Oct. 7th, Oct. 6th, Oct. 5th, Oct. 3rd, Oct. 2nd, Oct. 1st.

45 14 Q. Had the same shipping been done prior to Oct. 1st, as you have stated?

Mr. COOKINHAM: I object to it as incompetent, irrelevant, calls for a conclusion and a comparison.

Mr. BRONNER: Question withdrawn.

15 Q. Had shipments been made in the same way substantially prior to Oct. 1st?

A. Yes, sir.

16 Q. Were these shipments which you have mentioned made to customers?

A. Yes, sir; mostly through Critten, Clift Co.

17 Q. You have testified that 100 shares of stock of the Newport Knitting Co. were issued to 5 different persons, was that stock issued for the real estate which the Company owned, and which had been previously deeded to it.

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant.

A. Yes, sir.

18 Q. Personally, do you know how the debts of the Titus Sheard Co. were settled?

A. No, sir.

19 Q. Counsel for the defendant requests counsel for the complainant to produce the claim filed by the Titus Sheard Co. against the Newport Knitting Co. from trustee in bankruptcy.

20 Q. On your redirect examination you stated that the balance due from the Titus Sheard Co. to the Newport Knitting Co. on Sept. 1, 1903, was $5,139.72; you read that item from page 176 of Ex. B, did you not?

A. Yes, sir.

21 Q. In making that statement did you take into account the two credit items of $100.56 and of $585.72 on the same page?

A. No, sir.

22 Q. You also testified that on Sept. 26, the balance due from Titus Sheard Co. was $8,584.90; in making that statement did you take into account the 9 credit items aggregating approximately $9,800.12 appearing on the credit side of the same column between Sept. 1 and Sept. 26?

A. No, sir.

46 23 Q. If you had taken those 9 items into account, it would have shown that the Newport Knitting Co. owed the Titus Sheard Co. approximately $215, would it not?

A. Yes, sir.

24 Q. On your redirect examination you testified that the entry in the bill book concerning the first note, of Jan. 7th, 1901, of $5,773.05, was not in your handwriting; did you refer to the second item at the top of the first page of Ex. D for identification?

A. Yes.

25 Q. Isn't the entry concerning that note under the column remarks renewed by note No. 8 in your handwriting?

A. Yes, sir.

26 Q. At the time you made that entry did you have the note of Jan. 7, 1901, before you?

A. No, sir.

27 Q. At about the time you made that entry did you see the note on Jan. 7th, 1901?

A. No, sir.

28 Q. Did you ever see the note of Jan 7th; if so, when?

A. When the note renewing it was delivered at the bank.

29 Q. Do I understand you to say that at about the time renewal note No. 8 was made, that you saw the note of Jan. 7th?

A. Yes.

30 Q. On the same page you find note No. 8, don't you?

A. Yes, sir.

31 Q. That entry is all in your handwriting, isn't it?

A. Yes, sir.

32 Q. It was dated May 7th?

A. Yes, sir.

33 Q. And became due Sept. 9th?

A. Yes, sir.

34 Q. And when it was due a payment of $773.05 was made and a renewal note, No. 14, given for $5,000?

A. Yes, sir.

35 Q. After that time were all the entries in that book, concerning that note, made by you?

A. Yes, sir.

36 Q. Was a claim filed by the Titus Sheard Co. against the bankrupt estate of the Newport Knitting Co. to your knowledge?

A. Yes, sir.

37 Q. Do you know for how much, approximately?

A. $172.57.

47 38 Q. And was that amount correct, and did it represent the balance due from the Newport Knitting Co. to the Titus Sheard Co. at the time you were appointed receiver of the former?

A. Yes, sir.

Re-redirect examination by Mr. COOKINHAM:

1 Q. In answering the counsel that goods were shipped by the Newport Knitting Co. during the month of October, 1903, up to Oct. 20th, you stated that by examining the bill book of the Newport Knitting Co., did you not?

A. Yes, sir.

2 Q. And this bill book shows the amount of goods shipped and to whom shipped, does it not?

A. Yes, sir.

3 Q. Were these shipments made to fill orders previously given?

A. Yes, sir.

4 Q. In answer to the 15th recross examination, you stated that shipments had been made in the same way substantially prior to Oct. 1st; what do you mean by substantially the same way?

A. In the same way they were billed during the month of Oct.

5 Q. That is, you mean they were billed in the same way?

A. Yes, and shipped in the same way.

FRANK SENIOR, called for the complainant, examined by Mr COOKINHAM, and testified as follows:

1 Q. Where do you live, and what is your present occupation?

A. Little Falls, N. Y., and am now president of the Rex Knitting Co.

2 Q. Were you formerly connected with the Newport Knitting Co., and if so, in what capacity?

A. I was; I was vice-president and general manager, and a director.

3 Q. Were you connected with the Titus Sheard Co; if so, in what capacity?

A. I was, as treasurer and director.

4 Q. What was the business of the Newport Knitting Co.?

A. Manufacturer of knit underwear.

48 5 Q. What was the business of the Titus Sheard Co.?

A. Manufacturer of knit underwear.

6 Q. Do you know of the H. P. Snyder Mfg. Co.?

A. Yes.

7 Q. What was its business in the year 1904?

A. Manufacturer of bicycles and knitting machinery principally.

8 Q. What kind of knitting machinery?

A. It was what is known as Latch Needle Knitting Machine.

9 Q. Did this Co. make any other kind of knitting machinery?

A. I think not.

10 Q. Did it make any other kind of machinery used in a knitting mill, if so, what?

A. Yes; winding machines.

11 Q. Is that all of the machinery made by this Snyder Co. which is used in a knitting mill?

A. I think so.

12 Q. Were you connected with the Newport Knitting Mill in the capacities that you have mentioned and also as a stockholder during its entire existence?

A. Yes.

13 Q. During the same time were you also connected with the Titus Sheard Co.?

A. Yes.

14 Q. You were also a stockholder in the Titus Sheard Co.?

A. Yes.

15 Q. Were you connected in any way with the H. P. Snyder Mfg. Co., and if so, in what capacity?

A. Yes; I was secretary and a director.

16 Q. Was Titus Sheard connected with the Snyder Co., and if so, in what capacity?

A. Yes; he was its president and a director.

17 Q. Were you in charge of the affairs of the Newport Knitting Co. at Newport at the beginning of its existence?

A. Yes.

18 Q. Who had charge of the procuring of the title to the real estate at Newport owned by the Newport Knitting Co.?

Mr. MILLS: Objected to as incompetent, immaterial.

49 A. I suppose Mr. Sheard looked after that.

19 Q. Do you remember to whom the deed of that real estate was delivered when the property was transferred to the Newport Knitting Co.?

A. No.
20 Q. Was it delivered to you?
A. I think not.
21 Q. The citizens of Newport subscribed to a fund to purchase this real estate, did they not?

Mr. MILLS: I object to that as incompetent and immaterial, and there is better evidence.

A. I supposed they did.
Mr. MILLS: I move to strike that answer out.

Overruled. Exception.

22 Q. Did the Newport Knitting Co. pay anything for the real estate which was deeded to it, and which was located at Newport?
A. Not to my knowledge.
23 Q. How did they obtain the title to the property?
Mr. MILLS: I object to that.

Overruled. Exception.

A. I couldn't say.
24 Q. Do you know whether or not they ever had a deed of the property?
A. Yes.
25 Q. How did they obtain the deeds?
A. I don't know.
26 Q. Was this title received from Titus Sheard?
A. I couldn' say.
Recess for lunch.

Hearing continued 2 o'clock. Same appearances.

27 Q. How much stock was issued to you in the Newport Knitting Co.?
A. 45 shares.
28 Q. Was this in 2 certificates, one of 20 shares and the other of 25?
A. It was.
50 29 Q. Did you pay anything for the stock represented by the certificate for 20 shares?
A. I understand not.
30 Q. Did you pay anything for the stock represented by the certificate for 25 shares?
A. Yes.
31 Q. How and what did you pay for that, and how and what did the other stockholders of the Co. pay for the stock represented by the certificates for 25 shares issued to them?
A. Snyder Mfg. Co. had sold to the Newport Knitting Co. machinery to about $10,000 or more; this block of 25 shares of stock, together with two other blocks of the same amount owned by Mr. Sheard and Mr. Snyder, was credited to the Newport account and charged to us at par. That was afterwards paid for in all or in part by dividend declared on the Snyder Co. stock.

32 Q. Were you a stockholder in the Snyder Co., and if so, for how much stock?

A. Yes, I owned 50 shares of $100 each.

33 Q. During the life of the Newport Co., it had dealings with the Titus Sheard Co., did it not?

M. G. BRONNER: Objected to as incompetent, improper and immaterial.

A. Yes.

34 Q. What was the character of those dealings?

M. G. BRONNER: Objected to as incompetent, improper and immaterial.

A. They bought goods of each other back and forth, and supplies.

35 Q. Were these transactions entered upon books of both Companies?

A. I suppose they were.

36 Q. What were your duties in the Sheard Co.?

A. My duties were largely in the mill.

37 Q. In the buying and selling back and forth of material and goods between the Sheard Co. and the Newport Knitting Co., who acted as representative as the Titus Sheard Co.?

A. In smaller transactions I did, alone?

51 38 Q. In the larger transactions who acted for the Titus Sheard Co.?

A. I did, in consultation with Mr. Sheard.

39 Q. In these matters, who acted for the Newport Co.?

A. Same people.

40 Q. And you fixed the prices both ways for the articles that were purchased and sold?

A. Yes.

41 Q. Were goods and material, supplies sold back and forth between these companies sold and purchased at the same price as between other customers of each?

A. Largely and generally yes.

42 Q. Do you remember when the books of the Newport Co were brought to the office of the Sheard Co.?

A. Yes.

43 Q. These books were kept in the same room, and you had access to both sets of books at all times?

A. Yes.

44 Q. How often were you at the plant in Newport during the existence of the Company?

A. Possibly an average of twice a week, not over that.

45 Q. Did you attend to the equipping of the Newport Co.'s plant?

A. I helped.

46 Q. Of whom was the machinery and tools purchased to equip that plant?

A. It was bought from the Snyder Mfg. Co., Union Special Sewing Machine Co., Davis & Furbow Machine Co., Sturdevant Co., in Boston; Titus, Sheard Co., and several others that I don't recollect.

47 Q. Were bills of this machinery received by the Knitting Co.?
A. Yes, I believe they were.
48 Q. What became of those bills?
A. I don't know.
49 Q. Did you ever see the bills?
A. Yes.
50 Q. Where did you last see them?
A. I think at Newport, in the office.
51 Q. Do you know what became of them finally?
A. No.
52 Q. Were the bills for machinery, tools and fixtures ever to your knowledge entered in the pay books upon the books of the Newport Knitting Co.?
A. No.
52 53 Q. What proportion of the machinery, fixtures and tools of the Newport Knitting Co. was furnished by the H. P. Snyder Mfg. Co.?
A. Well, offhanded, I should say half.
54 Q. Was that all new machinery and new tools and fixtures.
A. I believe it was, except possibly a dynamo.
55 Q. What was the value of the dynamo?
A. I don't remember.
56 Q. Did you ever see the bill of this property furnished by the Snyder Co.?
A. Yes, I believe I did.
57 Q. Do you know what became of that bill?
A. No.
58 Q. Who fixed the price of this machinery of the Snyder Co.?
A. The Snyder Co. Probably after consultations between Mr. Snyder, Mr. Sheard and myself.
59 Q. What became of that machinery finally?
A. I don't know.
60 Q. During the time that you were general manager of the Newport Knitting Co. was any property of any kind removed or disposed of by that Company except in its regular course of business by sale; if so, what?
A. No, not to my knowledge. There was some machinery that went through the regular course.
61 Q. What was the machinery sold?
A. Winders.
62 Q. How much of an item was this?
A. To the best of my recollection, there were one or two, I think, sold, and, I rather think, they were sold for something over $200.
63 Q. Do you know of any money or securities of the Newport Co. being abstracted by anyone from the Co. by any means whatever without the Company receiving a proper consideration therefor?
A. No, sir.
64 Q. Was the plant at Newport in substantially the same condition at the time it was thrown into bankruptcy as it was on the 26th day of Sept., 1903?
A. Yes, sir.

53 65 Q. Were the supplies and stock on hand and manufactured goods at that time in substantially the same condition as when the Company was thrown into bankruptcy, except as to the manufactured goods, which were shipped out between the 26th day of Sept., 1903 and the time that the Company was thrown into bankruptcy?

A. Yes, I think so, except that possibly there were less raw material, yarn, etc., which had been made up into goods and properly shipped out.

66 Q. Did the Newport Knitting Co. meet with any losses between the 26th day of Sept., 1903, and the time it was thrown into bankruptcy; if so, what?

A. Not to my knowledge.

67 Q. You, as a director, attended the annual meeting of the stockholders of the Newport Knitting Co. in 1902?

A. I don't recollect attending any regular meeting.

68 Q. Do you remember attending any meeting as director of the Co.; if so, when?

A. I don't recollect of ever attending any meeting of the Co.

69 Q. Then, the way the business was done, you and Mr. Sheard and Mr. Stinson talked the matter over instead of attending regular directors' meetings, did you not?

A. Yes, except that Mr. Snyder was more usually in the consultation than Mr. Stinson.

70 Q. Do you know by whose authority the $10,000 of stock in the Co. was issued represented by the 5 certificates of 20 shares each?

A. No. I am not sure that I do.

71 Q. Who paid the consideration for that real estate deeded to the Company?

A. I don't know; I suppose though the citizens of Newport.

72 Q. So far as you know the Newport Knitting Co. paid nothing for the real estate that was deeded to it at Newport upon which this business was carried on?

Mr. BRONNER: Objected to as incompetent, immaterial and improper; no foundation laid.

Overruled. Exception.

54 A. So far as I know, it did not.

73 Q. Do you remember the note of $5,000 made by the Co. and dated Aug. 22, 1903?

A. Yes.

74 Q. Did you sign the note?

A. I don't remember.

75 Q. Do you remember who took it to the bank for discount, and, if so, who?

A. I don't know.

76 Q. Do you remember whether or not you did?

A. No.

77 Q. In the course of business of the Sheard Co., who attended to the banking business?

**A. Mr. Sheard.**

78 Q. Do you remember when the note was paid?
A. Yes.
79 Q. Did you and Mr. Sheard have a consultation in regard to the payment of this note before it was paid?
A. Not that I recollect.

Mr. BRONNER: I object to the question, incompetent, improper.

Mr. COOKINHAM: Question waived.

80 Q. Do you remember how the note was paid?
A. I think I do.
81 Q. How?
A. I think it was paid by check of the Titus Sheard Co.
82 Q. Do you remember who went to the bank to pay it?
A. No, I do not.
83 Q. Did you go to the bank to pay it?
A. No, I don't think so.
84 Q. Can you state the amount of indebtedness of the Newport Knitting Co. on the 26th day of Sept., 1903?
A. No.
85 Q. Can you state approximately the amount?
A. No.
86 Q. Do the books of the Company show, as you understand it, the amount of the indebtedness of the Co.?
A. I don't understand.
87 Q. As general manager of the Co., you had charge of the purchases of the Co., did you not?
A. Yes, largely.
88 Q. And when the bills were received for articles purchased, did you examine them?
55 A. Yes, sir.
89 Q. Where are the bills for purchases by the Co. now?
A. I don't know.
90 Q. What did you do with them after you examined them?
A. I O. K. them for price and terms.
91 Q. Did you also direct what bills were to be paid?
A. No, I think not.
92 Q. Who gave the direction for the payment of the bills that were paid?
A. I believe Mr. Sheard, largely.
93 Q. Can you tell by examining the bills at this time whether or not they are correct, if the bills are presented to you?
A. I think I could.
94 Q. Do you know how much the indebtedness of the Co. was represented in notes?
A. No, I don't remember.
95 Q. Did you ever see the $5,000 note, dated Aug. 22, 1903, and discounted by defendant, after it was taken up?
A. I do not recollect seeing it.
96 Q. Do you remember ever knowing what became of that note after it was taken up?
A. No.

97 Q. You knew the condition of the Newport Knitting Co. on Sept. 26, 1903, did you not?

A. I don't know as I did.

98 Q. Did you know at that time that it was not able to pay its debts?

A. I don't know as I did.

99 Q. On or prior to the 26th day of Sept., 1903, had you and Mr. Sheard talked over the condition of the Newport Knitting Co.?

Mr. BRONNER: Objected to as incompetent, immaterial, improper and hearsay.

A. We had.

100 Q. You had discussed, had you, the question of its being able to meet all its obligations?

A. No, I don't know as we discussed that.

101 Q. Had you talked with him about the Newport Knitting Co. being solvent or insolvent?

A. I don't know as we did.

56 102 Q. Did the Newport Knitting Co. on the 26th day of Sept., 1903, pay another note given by it to the H. P. Snyder Co., and which was not due?

Mr. BRONNER: I object to it as incompetent, improper and immaterial.

Overruled. Exception.

A. I think there was a note of the Snyder Co. paid, but I don't remember just when or the amount.

Mr. COOKINHAM:

103 Q. I show you bill of Arnold, Hoffman & Co. against the Newport Knitting Co. and ask if that states the amount due from the Knitting Co. to that firm?

A. I don't know whether that is correct or not.

104 Q. Have you the means of knowing whether that is correct or not?

A. No, I have not.

105 Q. Did you state to-day that if the bill of items of property purchased by the Newport Knitting Co. were presented to you, you could tell whether they were correct as to amount at the prices and articles?

A. If I did, I did not understand the question, and should have said the original bill that bore my O. K.

106 Q. Then, what you say now is by examining a bill of items sold by the creditors of the Newport Co. by the respective creditors, you cannot tell whether the amount claimed by them is true or not, is that correct?

A. Yes, that is substantially correct.

107 Q. Can you tell by examining the notes attached to the proofs of debt whether or not they are correct?

A. I think I could.

Mr. COOKINHAM: I show you the proof of debt of the National Bank of Newport, N. Y., and ask you what amount appears to be due that bank from that proof?

Mr. BRONNER: Object to it as incompetent, improper and calls for witness' conclusion, and calls for contents of paper, which paper is the best evidence.

57 A. To the best of my recollection, there were four notes of $5,000 each, as shown by these copies.

108 Q. Did that indebtedness exist on the 26th day of Sept., 1903?

A. I think it did.

109 Q. I show you the proof of Orville N. Purdy, and ask if you can tell what amount was due Orville N. Purdy from the Newport Knitting Co. on the 26th day of Sept., 1903?

A. I believe there was due Mr. Purdy $10,000, with possibly some interest.

110 Q. I show you three proofs in favor of David H. Burrill, M. G. Bronner, and Charles A. Miller, and ask you to state the indebtedness represented by those proofs on the 26th day of Sept., 1903?

A. I should think $5,000 in each case, and possibly interest.

111 Q. I show you a proof of Wm. B. Charles, and ask you what the indebtedness represented by that is from Newport Knitting Co. on the 26th day of Sept., 1903?

A. $1,312.86, and some interest.

112 Q. Another proof of the National Bank of Newport, and ask you what the amount of indebtedness of that is from the Newport Knitting Co. on the 26th day of Sept., 1903?

A. $1,500.

113 Q. The proof of debt of A. M. Mills shows an indebtedness of the Newport Knitting Co. to A. M. Mills of $323.45. This is conceded by attorneys for the defendant.

114 Q. I show you the proof of debt of Geo. W. Kavanaugh and ask you if that amount of indebtedness is correct on the 26th day of Sept., 1903?

A. The only part of it that I can state positively is the note of $600. The balance of the account I could not say, as to its correctness.

115 Q. I show you the proof of the First National Bank of Ballston, and ask you how much was due that bank on Sept. 26, 1903?

A. $5,000, and I suppose some interest.

116 Q. I show you proof of the Acme Paper Box Co., and ask you how much was due to that concern on Sept. 26, 1903?

A. On the note, $838.44, and probably an interest charge.

58 There was also something due on open account, but I can't state as to the amount.

By consent, hearing is adjourned to Friday morning, October 25th, 1907, at 10 o'clock.

Hearing continued, October 25th, 1907, at 10 o'clock a. m. Same appearances.

Mr. FRANK SENIOR, still on the stand, testifies as follows:

117 Q. I show you proof of debt of William E. Cahill, and ask you if you can state whether the amount of indebtedness in the proof is the correct amount due from the Newport Knitting Co.?

A. Regarding this claim, I am not positive as to the amount, but I suppose that he had a claim against the Newport Co. as set forth in my letter of Mar. 8th, 1904, annexed to the proof.

118 Q. I show you the proof of The Crawford Mfg. Co., and ask if you can state whether or not the amount of indebtedness in the proof is the correct amount due that Co.?

A. I believe it is.

119 Q. I show you the proof of the Titus Sheard Co., and ask if the amount upon which the proof is made, $172.57, is the correct amount due from the Newport Knitting Co.?

A. Yes, sir; I believe it is.

120 Q. Was there any material change in the financial condition of the Newport Knitting Co., as to its assets and liabilities, between the 26th day of September, 1903, and the time it was thrown into bankruptcy?

A. Well, I really couldn't say as to that.

121 Q. Can you state whether or not the Newport Knitting Co. met with any losses between those dates?

A. Not that I know of specially.

122 Q. Between those dates did they lose any property
59 by fire or calamity of any kind?

A. Not to my knowledge.

123 Q. Were there any defalcations by any of its officers or employees between those dates, by which the Co. met with any loss?

A. Not to my knowledge.

124 Q. Then, so far as you know, the financial condition of the Co. was substantially the same on the 26th day of Sept., 1903, as it was when it was thrown into bankruptcy?

A. Yes.

125 Q. Does the Sheard Co. carry on any business now?

A. No, sir.

126 Q. When did the Titus Sheard Co. cease to do business?

Mr. BRONNER: Objected to as incompetent, improper and immaterial.

Overruled. Exception.

A. To the best of my recollection, it ceased active business some time in 1904.

127 Q. When, with reference to the death of Mr. Sheard, did the Titus Sheard Co. cease to manufacture goods?

A. To the best of my recollection, a short time before Mr. Sheard's death.

128 Q. After that it went into liquidation, did it not, and compromised its indebtedness, or a large portion of it, did it not?

A. It closed out its goods, I believe, but of course as to the compromising, I don't know positively.

129 Q. Who had charge of the settling up of the affairs of the Titus Sheard Co.?

Mr. BRONNER: Objected to as incompetent, improper and immaterial.

Overruled. Exception.

A. I believed they were settled by David H. Burrell, Myron G. Bronner and Charles A. Miller.

130 Q. Did you verify the schedule of debts of the Newport Knitting Co. that I now show you?

A. Yes, sir.

60 131 Q. By examining that paper, does it refresh your recollection to such an extent that you can say the indebtedness stated therein was correct?

A. I think undoubtedly it was.

132 Q. I show you schedule A complete, as verified by you in the bankrupt proceedings of the Newport Knitting Co., and ask if you can identify it as the one you did swear to?

A. Yes.

Overruled. Exception.

Offered in evidence Schedule A, giving the debts of the Newport Knitting Co., filed in the U. S. District Clerk's office, Northern District of New York, Feb. 13, 1904. Received in evidence and marked Exhibit 2, Oct. 25th, 1907.

Mr. BRONNER: Objected to as incompetent, improper, hearsay and immaterial; no evidence as against the defendant.

Mr. COOKINHAM: I now offer in evidence dividend warrant in the bankrupt proceeding of the Newport Knitting Co., signed by Wm. H. Comstock, referee in bankruptcy, and bearing his official seal.

Mr. BRONNER: Objected to same as last.

Overruled. Exception.

Received in evidence and marked Ex. 3, Oct. 25th 1907.

Mr. COOKINHAM: I offer in evidence the proof of debt of the First National Bank of Ballston Spa, verified Mar. 3, 1904.

Mr. BRONNER: I object to it on the same ground as last.

Overruled. Exception.

Received and marked Ex. 4, of Oct. 25th, 1907.

Cross-examination by M. G. BRONNER:

1 Q. Do you know what the real estate in the Village of Newport, which was deeded to the Newport Knitting Co., cost?

A. No, I do not.

61 2 Q. Is it a fact that 100 shares of the capital stock of the Newport Knitting Co. was issued to O. N. Purdy, for which he paid $10,000 in money?

A. Yes.

3 Q. Is it a fact that 25 shares each of the stock were issued to Titus Sheard, Homer P. Snyder and yourself, which were paid for in full by machinery sold by the Homer P. Snyder Mfg. Co. to the Newport Knitting Co.?

A. Yes.

4 Q. Is it your understanding that 100 shares of such stock was paid for, or issued in consideration of the real estate which was deeded to the Co.?

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant, not calling for a fact, but an operation of the mind of the witness.

A. It is.

5 Q. You know as a fact, do you not, that these 100 shares were issued on account of said real estate?

A. I do.

6 Q. You have accounted now for 275 shares of the capital stock of the Company, and stated how it is paid for; can you state how the remaining 25 shares were paid for? If so, state it.

A. The 25 shares were, I believe, issued to Mr. Stinson, and were paid for by crediting $2,500 on the books of the Titus Sheard Co. to the credit of the Newport Knitting Co., who were owing the Titus Sheard Co. at that time, and charged to Mr. Sheard personally, and I believe that Mr. Stinson gave his note to Mr. Sheard.

7 Q. What was the indebtedness from the Newport Knitting Co. to the Titus Sheard Co. against which this stock was charged, made up of?

A. It was made up of moneys that had been advanced, paid bills of the Newport Knitting Co., and machinery and supplies furnished by the Newport Knitting Co. to the Titus Sheard Co.

8 Q. When the machinery, etc., sold by the Snyder Mfg. Co. to the Newport Knitting Co. was contracted for, was it with
62 the understanding that they were to accept $7,500 of the capital stock of the Newport Knitting Co. towards the payment thereof?

A. I don't think so, exactly, no.

9 Q. When was that understanding reached?

A. The understanding was that we should pay for the $7,500 stock by crediting the Newport Co. stock with the Snyder Co., but it was to be issued to the individual.

10 Q. When was that understanding reached?

A. I don't remember the date; it was prior to the delivery of the machinery.

11 Q. On your direct-examination you stated that you conducted the smaller transactions between the Titus Sheard Co. and the Newport Knitting Co., yourself acting for both; what do you mean by the smaller transactions?

A. I mean the minor exchanges of supplies.

12 Q. State what there was about that?

A. Both concerns made similar lines of goods and frequently made exchange back and forth—such things as trimmings, buttons, general small supplies of the mill.

13 Q. How were the other and large transactions conducted?

A. They were made after consulting with Mr. Sheard, and often with Mr. Snyder and Mr. Sheard.

14 Q. As to the prices, by the Titus Sheard Co. for goods and property purchased from the Newport Knitting Co.?

A. On the small exchange accounts and supplies, they were all exchanged on a cost basis on both sides. When the Titus Sheard Co. purchased manufactured goods, they paid them the regular market price, same as paid by other customers; in fact, the goods purchased by Sheard Co. from Newport netted the Newport Co. more money than those purchased by outside customers, from the fact that no commission was paid or allowed the Sheard Co. on the goods they got. Goods to the outside paid a commission to the sales agent, Critten, Clift & Co., of from 3 to 5%.

15 Q. Did you attend to the making of entries in or the
63 keeping of the account book of the Newport Knitting Co., or were you familiar with such entries?

A. No, sir.

16 Q. On your direct-examination you spoke of a $5,000 note which was held at one time by the defendant, dated Aug. 22, 1903, was this note the first of the series, and if not, when was the note of which that was a renewal made by the Newport Knitting Co.?

A. No, it was not the first; I think the note that that was a renewal of was made early in Jan., 1901.

17 Q. What was the amount of that first note?

A. $5,700.

18 Q. By whom was that original note discounted at the National Herkimer County Bank, and who, if anyone, received the proceeds thereof?

A. Discounted by the Titus Sheard Co., and they received the proceeds.

19 Q. About when did the Titus Sheard Co. receive the proceeds of that note?

A. Early in Jan., 1901.

20 Q. Was a payment made upon that note subsequently by the Newport Knitting Co., and if so, how much?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

A. There was a payment made of about $700. To reduce the amount to an even $5,000.

21 Q. Was the note continued for the $5,000 down to Aug. 22, 1903?

A. Yes.

22 Q. You knew that a receiver of the Newport Knitting Co. was appointed after the middle of Oct., 1903, did you not?

A. Yes, sir.

23 Q. Is it not a fact that that receiver sold and disposed of a considerable part of the property of that Co. before the bankruptcy proceedings were started?

A. That is as I understand it.

24 Q. How long was Titus Sheard sick and confined to his home prior to his death?

A. I am not at all sure, but I think for five or six weeks.

64 25 Q. Is it not a fact that the citizens of, and persons interested in, the Village of Newport, raised money by subscription, and purchased and paid for the real estate which was deeded to the Newport Knitting Co. in order to induce that Company to locate there and do business?

A. Yes, sir.

26 Q. Was there a subscription list for this purpose, and if so, please state what became of it, if you can?

A. I presume there was a list, but I have no recollection of ever seeing it and knowing where it is.

Redirect examination by Mr. COOKINHAM:

1 Q. Did you ever take away from the office of the Newport Knitting Co. the unpaid bills for any of the valuable papers of the Company?

A. No.

2 Q. Do you know what became of the unpaid bills against the Company, bill files and other valuable papers of the Company, or any of them, and if so, state it?

A. No, I don't know what became of them; I suppose they were turned over to the receiver.

3 Q. By receiver, which you have referred to once or twice in your testimony, you mean Mr. Stinson, do you not?

A. I do in the above answers.

4 Q. The stock represented by the $2,500 certificates was paid in full by dividends upon the stock of the Snyder Co., was it not, to you as individual?

A. It paid in full the account of Snyder and Sheard, but not mine.

5 Q. You answered counsel upon the other side, that the $10,000 worth of stock of the Newport Co. was paid for by the real estate which was deeded to the Newport Co. I ask you if the stock was issued to the people who deeded the real estate to the Company?

A. No.

6 Q. Was it issued to any person who contributed money for the purchase of that property, so far as you know?

A. No.

7 Q. Then the real transaction was as follows: Certain

65 persons subscribed and paid money to purchase the real estate, the deeds were given to the Co., and the stock was issued to Titus Sheard, Frank Senior, E. I. Stinson, Weyman Walker and H. P. Snyder in blocks of 20 shares each, was it not?

M. G. BRONNER: I object to it; the question does not correctly state the testimony, or the substance thereof, in that it is not stated that the money was subscribed for the purpose of inducing the Newport Knitting Co. to locate in and do business at the Village of Newport.

A. My understanding was that it was issued against the real estate; that is about as I understand it.

8 Q. Are you a depositor and customer of the defendant?

A. I am not personally, but the Co. I am interested in is.

GEORGE E. DENNISON, called for the complainant, testifies as follows:

It is stipulated that his statement shall be taken in all respects the same as though he were sworn by the Notary.

1 Q. Where do you live, and what is your profession?

A. I live in the City of Utica, and am an attorney and counselor at law.

2 Q. Are you now in charge of the office of the late William H. Comstock, Referee in Bankruptcy for the District of Oneida and Herkimer Counties?

A. As attorney for the executor I am.

3 Q. About when did Mr. Comstock die?

A. About Nov. 7th, 1907.

4 Q. Do you find among the records in his office, proofs of debt in the bankruptcy proceeding of the Newport Knitting Co.?

A. I do.

5 Q. Have you those proofs present at this hearing?

A. I have.

Recess for lunch.

66 Hearing continued at 2:30 o'clock p. m.
Same appearances.

GEORGE D. SMITH, called for the complainant, and testified as follows:

1 Q. Where do you reside and what is your business?

A. Little Falls, N. Y., cashier of the National Herkimer County Bank, and have been between seven and eight years.

2 Q. As such, what are your duties?

A. I have general supervision of the force of the bank, sign drafts, etc., and have to do with the discounting of papers; I am in charge of the active force of the bank.

3 Q. Who are the other officers?

A. D. H. Burrill, president; J. J. Gilbert, vice-president.

4 Q. How long have the same officers held their respective offices?

A. About 7 years.

5 Q. Have you the book here in which you keep the record of the directors' meeting of the bank?

A. Yes, sir.

6 Q. Will you produce it and turn to the directors' meeting in 1903, and state who was elected directors of the bank at that meeting, giving the date of the meeting?

A. Jan. 10th, 1903, and the following directors were elected for the year ensuing: William G. Milligan, David H. Burrill, S. R. Ingham, Titus Sheard, R. S. Whitman, Charles A. Miller, M. G. Bronner, J. J. Gilbert and George D. Smith.

7 Q. How long had Titus Sheard been a director of the bank?

A. For ten years.

8 Q. How frequently in the year 1903 were directors' meetings held?

A. About once a month, I should say.

9 Q. Did the bank have committees among the Board of Directors?

A. Yes, sir.

10 Q. Do the names of the different committees appear on the record book of the bank?

A. No, sir.

11 Q. What record has the bank of the different committees?

A. None whatever.

67 12 Q. Can you state what committees Titus Sheard served on?

A. None.

13 Q. Did Titus Sheard have an account at the bank during the years 1902 and 1903?

A. I think he did.

14 Q. Did the Titus Sheard Co. have an account with the bank during the years 1902 and 1903?

A. Yes, sir.

15 Q. Did the Newport Knitting Co. ever have an account with the bank?

A. No, sir.

16 Q. In 1903, did you know personally Frank Senior?

A. I did.

17 Q. During the same time, did you know E. I. Stinson?

A. I did.

18 Q. During the same time, did you know H. P. Snyder?

A. I did.

19 Q. How frequently during the year 1903 was Mr. Sheard at the bank?

A. That I couldn't say.

20 Q. Mr. Sheard was a personal friend of Mr. Burrill, was he not?

A. I think so; yes, sir.

21 Q. And a personal friend of yourself?

A. Yes, sir.

22 Q. Did the bank own a note made by the Newport Knitting Co., dated Aug. 22, 1903, for $5,000, payable in 3 months from date?

A. Yes, sir.

23 Q. Did this note bear interest?

A. It did not.

24 Q. When it was discounted the interest was taken out of the principal, and credit given for the balance, was it not?

A. When the note was first discounted, the discount was taken out of it and the proceeds credited to the account of Titus Sheard Co., after which the note was simply renewed, and the discount paid.

25 Q. When the note was paid, the bank charged interest up to the 26th day of Sept., 1903, and gave credit for the interest that had been paid, did it not?

A. On Aug. 22 the note was renewed for 3 months and the discount paid to that time; on Sept. 26, the note was paid, less a discount for the unexpired time.

68 26 Q. What day did this note fall due?

A. Nov. 23, 1903.

Cross-examination by Mr. BRONNER:

1 Q. Do you remember whether Titus Sheard attended all of the directors' meetings in 1903?

A. I do not.

2 Q. Can you state, as a matter of recollection, whether he did attend all of them?

A. I cannot.

3 Q. Did this note of Aug. 22, 1903, constitute one of the series of notes by the same maker?

A. It did.

4 Q. What was the date of the first note of that series?

A. Jan. 8th, 1901. Amount, $5,773.05.

5 Q. What concern brought that note to your bank?

Mr. COOKINHAM: Objected to as incompetent, immaterial and irrelevant.

A. The Titus Sheard Co.

6 Q. Was it then discounted by your bank, and, if so, at whose request?

A. It was at the request of the Titus Sheard Co.

7 Q. What was done with the proceeds of that discount?

A. Passed to the credit of the Titus Sheard Co. at the bank.

8 Q. Were the proceeds of that discount afterwards checked out by the Titus Sheard Co.?

Mr. COOKINHAM: Objected to as incompetent, immaterial and irrelevant.

A. They were.

9 Q. Was the discounting of that note and the crediting of the proceeds in the way that you have described, done in the ordinary course of business of your bank?

A. Yes.

10 Q. When you accepted that note for discount, were you familiar with the endorsement of the Titus Sheard Co. and did that note bear such endorsement?

Mr. COOKINHAM: Objected to as incompetent, immaterial and irrelevant.

69 A. I was and it did.

11 Q. That note matured when?

A. May 7, 1902.

12 Q. On May 7, 1902, what was done with reference to that note?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

A. It was renewed for 4 months, which renewal became due Sept. 9, 1902.

13 Q. Was it renewed again on Sept. 9, 1902?

Mr. COOKINHAM: Same objection as last above.

A. It was, for $5,000.

14 Q. What was done about the balance?

A. The balance was paid.

15 Q. From that time state the history of that note, down to May 11, 1903?

Mr. COOKINHAM: I object to it as incompetent, immaterial and irrelevant.

A. It was renewed from time to time, as it fell due every 4 months.

16 Q. On May 11, 1903, what was done?

A. It was renewed for 4 months, note for $5,000 maturing Sept. 11, 1903.

17 Q. On or about Aug. 22, 1903, what took place between you and Titus Sheard or the Titus Sheard Co. with reference to that note?

Mr. COOKINHAM: I object, as incompetent, immaterial and hearsay, provided that the witness gives any conversation between him and Titus Sheard.

A. I called on Titus Sheard and told him that the note in question must be collateraled; that it should have been collateraled at the time of the renewal, and he replied that he would collateral it. I then said that we would like to have him take up the note giving us a new note with the collateral for the same back of it, which was done.

70 18 Q. After that talk of Aug. 22, 1903, note for 3 months was given?

A. Yes, sir.

19 Q. What was the nature of the collateral placed with this note at the time of its renewal on Aug. 22, 1903?

Mr. COOKINHAM: Objected to as incompetent, immaterial and irrelevant.

A. I think it was for accounts receivable.

20 Q. Whose accounts?

A. The Titus Sheard Co.

21 Q. And what was their approximate face value?

Mr. COOKINHAM: Objected to as incompetent, immaterial and irrelevant.

A. About $6300.

22 Q. How were those accounts receivable assigned or pledged to the bank as collateral to this note?

A. They were made payable to the National Herkimer County Bank.

23 Q. How were they made payable to the bank?

Mr. COOKINHAM: Objected to as incompetent, immaterial, irrele-

vant and not the best evidence as the assignments themselves would show for themselves.

A. By assignments of the bills to the National Herkimer County Bank.

24 Q. Was that assignment affixed to each of the bills, or stamped upon them?

A. Yes, sir.

25 Q. On or about Sept. 26, 1903, what took place with reference to the note dated Aug. 22, 1903?

Mr. COOKINHAM: Objected to as incompetent, immaterial and irrelevant, and not cross-examination, as the witness has not been interrogate which counsel for the defendant seeks to get evidence upon.

71 A. Titus Sheard came to the bank and said the Titus Sheard Co. wished to pay the note, which they were allowed to do.

26 Q. What, if anything, was said about interest?

A. Mr. Sheard asked if the interest would be credited for the unexpired time, and I told him that it would.

27 Q. After that conversation, what was done about the note?

A. The amount due was given him, and there was a check of the Titus Sheard Co. brought to the bank to pay the note, to take up the note.

28 Q. After the bank had received the check, what became of the note and the collateral?

A. They were delivered to the Titus Sheard Co.

29 Q. Have you ever seen the note from that time to this, and if so, when?

A. I have not.

30 Q. Do you know where it is?

A. I do not.

31 Q. Did your bank ever hold any note of the Newport Knitting Co., other than the notes of this series, beginning Jan. 8, 1901, which you have mentioned?

A. I did not.

Redirect-examination by Mr. COOKINHAM:

1 Q. Have you any letters or papers in the possession of the bank referring to this note made Aug. 22, 1903?

A. I have not.

2 Q. You mean by your answer, that neither you nor the bank has any paper of that description?

A. I do.

3 Q. Why was it you required Mr. Sheard or Titus Sheard Co. to furnish collateral to the note made May 11, 1903, and which was not yet due?

A. We were making him collateral all of his notes above $25,000 in amount.

As the banking department had insisted upon its being done. The note of May 11, when renewed, should have been collateraled

at the time, but it was not noticed by me until on or about
72 Aug. 22, 1903, that this had not been complied with, as the renewal at that time was taken by the teller of the bank, and not by myself.

4 Q. Then, at the time the note of Aug. 22d was given, the Titus Sheard Co. had $25,000 of discount without collateral, and this was in addition to that $25,000?

A. Yes, sir.

5 Q. Did you have anything to do with the closing up of the Titus Sheard Co.?

A. I did; yes, sir.

6 Q. Did that Co. pay its debts in full?

M. G. BRONNER: I object to it as incompetent, improper and immaterial.

Overruled. Exception.

A. It did not.

7 Q. Can you remember what the accounts were that were assigned to the bank as collateral for the note of Aug. 22, 1903?

A. I cannot.

8 Q. What became of these accounts after the note had been paid?

A. They were delivered back to the Titus Sheard Co.

9 Q. Is that all the bank did with the collateral which had been assigned to the bank—simply deliver them back to the Titus Sheard Co.?

A. So far as I remember.

Recross-examination by Mr. BRONNER:

1 Q. At the time of the renewal of this note, on or about Aug. 22, 1903, did the bank hold a considerable amount of the notes and obligations of the Titus Sheard Co. in excess of $25,000, and were they all secured by collateral?

A. Yes, sir.

2 Q. In general, what did that collateral consist?

A. Bills receivable, life insurance policies and stocks.

3 Q. In your answer to the 3rd redirect interrogatory, you said as part of your answer, "As the renewal at that time was taken by the teller of the bank and not by myself," did you refer to the renewal of May 11, or Aug. 22?

A. The note of May 11th.

73 Re-direct examination by Mr. COOKINHAM:

1 Q. About how much was the indebtedness of the Sheard Co. to the bank at the time this note of Aug. 22 was given?

A. About $160,000 and different makers, but for the benefit of the Titus Sheard Co.

2 Q. What was the capital stock of the Titus Sheard Co?

A. About $60,000 or $80,000.

Re-recross examination by Mr. BRONNER:

1 Q. Can you state approximately how this indebtedness of the Titus Sheard Co. was divided up among the different persons mentioned?

A. I cannot tell.

2 Q. Do you remember about how many different persons there were?

A. I should say about 8.

3 Q. And were all of the notes made by these different persons, excepting, of course, the $25,000 protected by collateral in the way you have testified?

A. They were.

Re-redirect examination by Mr. COOKINHAM:

1 Q. About how much life insurance did the bank hold as collateral to the Sheard indebtedness?

A. About $35,000.

Hearing continued on the 7th day of November, 1907, at 10 o'clock A. M.

Appearances:

H. J. Cookinham, for Complainant.

M. J. Bronner, and A. M. Mills, for defendant.

HOMER P. SNYDER, being duly sworn, testified as follows:

By Mr. COOKINHAM:

1 Q. Mr. Snyder, where do you live, and what is your present occupation?

A. Little Falls, N. Y. Machinery manufacturer.

74 2 Q. Are you connected with the H. P. Snyder Mfg. Co. of Little Falls, and if so, how long have you been connected with that Co. and in what capacity?

A. Since 1898 or 1899 I have been president and general manager. Have been president for 3 years last past.

3 Q. Were you formerly connected with the Titus Sheard Co., and if so, in what capacities?

A. I have never been connected with the Titus Sheard Co. in any capacity.

4 Q. Were you formerly connected with the Newport Knitting Co. and if so in what capacity, and for how long a time?

A. I was a director of the Newport Knitting since its organization and until its finish.

5 Q. Were you a stockholder of the Newport Knitting Co. and if so, how much stock did you hold, and how many certificates of stock were issued to you?

A. I was a stockholder and hold 1 certificate for 25 shares.

6 Q. Were you formerly a stockholder for a larger amount than 25 shares?

A. Not to my knowledge.

7 Q. Was not a certificate for 20 shares of stock in the Newport Co. issued to you?

A. Not to my actual knowledge.

8 Q. Do you know that such certificate was made out in the stock book of the Co. and delivered to any one?

A. I do not.

9 Q. Did you ever see a certificate for 20 shares of that stock filled out in your name?

A. To the best of my knowledge I never did.

10 Q. Did you ever pay anything for 20 shares of stock in that Co. represented by a certificate for that amount issued in your name?

M. G. BRONNER: Objected to as incompetent, and assumes that such certificate was issued.

Overruled. Exception.

75 A. Not to my knowledge.

11 Q. Have you a certificate of stock in that Co. issued to you for 25 shares, and if so, will you produce the certificate?

A. I have a certificate in that Company for 25 shares, which I herewith produce.

Mr. COOKINHAM: I offer the certificate in evidence, which is No. 7.

Mr. BRONNER: I object, as incompetent, improper and immaterial.

Overruled. Exception.

Received and marked Ex. 4, Nov. 7th, 1907.

12 Q. How was the stock represented by this certificate of 25 shares issued to you, paid for?

A. Titus Sheard, Frank Senior and H. P. Snyder were stockholders in the H. P. Snyder Mfg. Co. and were also stockholders in the Newport Knitting Co.; the H. P. Snyder Mfg. Co. furnished to the Newport Knitting Co. certain machinery of its own manufacture and certain machinery of other manufacture, which the Snyder Mfg. Co. purchased and sold to the Newport Knitting Co., making in amount up to and including all bills to Dec. 7th, 1900; the amount of that bill was $9,266.14. On the 20th day of Dec. the bill for $1,450 was rendered to the Newport Knitting Co., making a total indebtedness of $10,716.14. H. P. Snyder Mfg. Co. accepted in payment of that amount on Dec. 18, 1900, $7,500 made up as follows: $2,500 to Titus Sheard, $2,500 to Frank Senior and $2,500 to H. P. Snyder in the form of charging this amount to each of us separately on the books of the Snyder Mfg. Co. and giving credit to Newport Knitting Co. of $7,500. The balance was accepted in the form of a 4-months' note made by the Newport Knitting Co. to the order of the H. P. Snyder Mfg. Co. for $3,146.17 and the interest $69.97.

13 Q. How did H. P. Snyder, Titus Sheard and Frank Senior pay their obligations made in this way to the H. P. Snyder Mfg. Co?

M. G. BRONNER: Objected to as incompetent, immaterial and irrelevant.

Overruled. Exception.

76 A. All three of these parties had something due from the H. P. Snyder Co. at that time. The balance of the obligation, except as to Frank Senior, was paid by 20% cash dividend declared in the following September by the H. P. Snyder Mfg. Co. $3,000 of 20% dividend, $3,000 went to Snyder, $1,000 went to Frank Senior and $2,000 went to Mr. Sheard.

14 Q. Did you attend the stockholders' meetings of the Newport Knitting Co.?

A. I think I attended one.

15 Q. Did you attend any director's meeting of that Co.?

A. I think I attended one.

16 Q. Can you tell which one it was?

A. The first meeting when the Company was organized.

17 Q. So far as you know, were there ever any directors' meetings held after the one that you had attended?

A. So far as I know, there never was.

18 Q. Who had the active control of the business affairs of the Newport Knitting Co?

A. Frank Senior was the general manager, and had charge of the business, as I understood. H. P. Snyder Mfg. Co. did all of its business with him for the Newport Knitting Co.

19 Q. Were you frequently consulted with Mr. Senior in regard to the affairs of the Newport Knitting Co.?

A. Only as they pertained to purchases of machinery from the H. P. Snyder Mfg. Co., or regarding purchases that were making from other parties for the Newport Knitting Co.

20 Q. Who had charge of the financial part of the Newport Knitting Co.?

A. All the business that I ever done, pertaining to finances or otherwise, was done with Frank Senior.

21 Q. Did not Mr. Sheard have the control of the financial affairs of the Newport Knitting Co., particularly in regard to the borrowing of money?

Mr. BRONNER: Objected to as incompetent, immaterial and improper and no foundation laid.

Overruled. Exception.

77 A. I have no knowledge of that whatever.

22 Q. Were you ever consulted by any of the officers of the Newport Knitting Co. in regard to the giving of collateral to the defendant in this case, National Herkimer Co. Bank, or the discounting of any paper for that bank by the Newport Knitting Co.?

A. I never knew there was such a note until after the application for receiver of the Newport Knitting Co. I never knew of any collateral being given for that note or any other.

23 Q. Were you ever consulted by the officers of the Newport Knitting Co. in regard to the payment of the $5,000 note, dated August 22, 1903, and payable at the National Herkimer Co. Bank?

Mr. BRONNER: Objected to as incompetent, improper and immaterial and no foundation laid.

A. I never was.

24 Q. Did Mr. Purdy, who was a director of the Newport Knitting Co., take any active part in the management of the Co.?

A. Not to my knowledge.

25 Q. Where did Mr. Purdy reside?

A. I think his residence was Boston.

26 Q. Under a subpœna duces tecum you have in Court the books of the H. P. Snyder Co., in which appear the accounts between that Co. and the Newport Knitting Co. and with Titus Sheard, H. P. Snyder and Frank Senior, have you not?

A. I have.

27 Q. Did the Snyder Co. make any proof of claim in bankruptcy against the Newport Knitting Co.?

A. It did not.

28 Q. Was any of the machinery that you sold to the Newport Knitting Co. second hand, and if so what?

Mr. BRONNER: Objected to as incompetent, improper and immaterial.

A. The only thing that I recall that was second-hand was the dynamo and the fixtures that went with it, some shafting
78 pulleys and gas and steam pipe. Everything that the Snyder Co. sold Newport Co. either of its own make or purchased outside, was new, except as stated above.

Cross-examination by Mr. BRONNER:

1 Q. At what prices did you sell the machinery that you have spoken of to the Newport Knitting Co.?

A. The machinery that the Snyder Co. sold of its own manufacture, was sold at its regular list price; the machinery that the Snyder Co. purchased for the Newport Knitting Co. was sold at actual cost.

2 Q. Was the list price the usual selling price of the machinery?

A. It was our regular selling price.

3 Q. Have you the bills for machinery which you purchased from other parties for the Newport Knitting Co. herein referred to and do they show that the Newport Knitting Co. paid the prices that you paid?

A. I have the bills here and they show that the Snyder Co. charged Newport Co. for these items exactly as the bills.

4 Q. How was the price of the secondhand machinery which you mention, fixed and agreed upon?

A. At 60% of its original cost.

5 Q. Was it worth the price charged?

A. It was.

Redirect examination by Mr. COOKINHAM:

1 Q. How much of an item in the account was for this second-hand machinery?

A. $505.66.

2 Q. Was, to your general knowledge, any reduction or allowances from your list prices of machinery?

A. Nothing except the cash discount of 2% in cases of exchange.

3 Q. Do we understand that the price charged to the Newport Co. was precisely the same as the prices charged to other customers for the same article?

A. That is correct. At and during that period that was the prices we were charging.

79 CHARLES E. MASON, being duly sworn, testified as follows:

By Mr. COOKINHAM:

1 Q. Where do you live, and what is your occupation, and what connection, if any, have you with the Newport Knitting Co.?

A. I live at Utica, N. Y.; my occupation is a lawyer, and I am trustee in bankruptcy of the Newport Knitting Company.

2 Q. As trustee in bankruptcy of the Newport Knitting Co. did you receive certain property and money belonging to that Co.?

A. I did.

3 Q. State what amount of money you received from the receiver, Mr. Stinson?

A. I received in cash from Mr. Stinson on Jan. 18, 1904, the sum of $3,372.15 by check.

4 Q. You were first appointed receiver of the Newport Knitting Co. in the bankruptcy proceedings and afterwards appointed trustee, were you not?

A. I was.

5 Q. This money you stated you received from Mr. Stinson was received while you were acting as receiver in bankruptcy?

A. It was.

6 Q. What personal property besides money did you receive from Mr. Stinson?

A. Certain goods on hand, material, also debts due the bankrupt, machinery, mill and the books of the Co.

7 Q. What was the amount of the accounts receivable that came into your possession as receiver and trustee in the bankruptcy proceedings?

A. I can't state the exact amount. Between $500.00 and $700.00.

8 Q. Can you state the exact amount that you collected?

A. No.

9 Q. What became of the tangible personal property which came into your hands?

A. It was all sold at public auction.

10 Q. What real estate, if any, came into your hands as receiver or trustee in the bankruptcy proceedings?

A. The mill property at Newport, N. Y.

11 Q. Was the tangible personal property in the mill at
80 the time it came into your possession?

A. It was.

12 Q. When was this real estate and personal property sold?

A. On April 6th, 1904.

13 Q. Was it sold by direction of the court in bankruptcy?

A. It was.

14 Q. State how it was sold?

A. It was sold at public auction; in the first place the personal property was put up separately, and then the real estate was put up by itself; the aggregate amount did not reach the sum of $15,000, which was the limit that the Court put should be realized from this sale; that was the minimum amount. Under the order I was di-

rected that if the sale, as above stated, and in that manner, did not aggregate $15,000, to then put up the real estate and personal property together for sale. This I did and I received one bid of $15,000 from Jos. T. Wooster.

15 Q. What was finally done in regard to this sale?

Mr. BRONNER: I object as incompetent, improper and immaterial, as the prices realized at the sale cannot be used as a basis of determining the financial condition of the Newport Knitting Co. in Sept., 1903.

A. The property was struck off to Mr. Joseph T. Wooster, of Newport, N. Y., for the sum of $15,000.

16 Q. And that sale was consummated, was it not?

A. Yes, sir.

17 Q. What notice was given of the sale?

A. Printed notice was mailed to each creditor on Mar. 25, 1904; notice was also published in the Evening Times, a newspaper published at Little Falls, N. Y. Notice was also posted in the village of Newport, N. Y., in three public places.

18 Q. Notice of the sale was given as directed by the Court, was it not?

A. It was.

19 Q. Has any other property that belonged to the New-
81 port Co., except what you have mentioned, come to your hands either as receiver or trustee in the bankruptcy proceedings?

A. No, sir.

20 Q. Do you know of any other property of any kind, belonging to the Newport Knitting Co., that has not come to your hand as receiver or as trustee?

A. None, except this claim against the Herkimer Co. Bank of Little Falls.

21 Q. Have you paid out any money from this fund in your hands as trustee of the Newport Knitting Co., and if so, how much?

Mr. BRONNER: Objected to as incompetent, improper and immaterial.

A. Yes, I have. Everything has been paid by check.

22 Q. Are you now able to state the entire amount of money received by you, either as trustee or receiver?

A. Yes.

23 Q. Please state it.

M. G. BRONNER: Objected to as incompetent, improper and immaterial, the examination as to the solvency or insolvency of the Newport Knitting Co. should be confined to its condition in September, 1903.

A. It is $18,925.54.

24 Q. Are you able to state how much you have paid out for expenses?

A. Receivership expenses were $472.64. Allowances on settlement on my account as receiver, $1,127.19. Dividend of 15% was declared

which amounted to $9,931.03. I paid premiums on my bond as trustee, $240. Other expenses, of trusteeship, amounted in round numbers to $1,200. That includes fees of Comstock, referee, and my fees as trustee, based on amount of money received and paid out. I have on hand balance of $5,976.37.

25 Q. Have you a list of the claims in bankruptcy that have been allowed?

Overruled. Exception.

82 A. I have.

26 Q. Is the list correct?

Overruled. Exception.

A. I believe it is.

27 Q. For what purpose was this list prepared?

Overruled. Exception.

A. Prepared for 5% dividend.

28 Q. And was that prepared subsequent to the payment of the 15% dividend?

Overruled. Exception.

A. Yes.

Mr. COOKINHAM:

29 Q. I offer the paper in evidence.

M. G. BRONNER: I object to it as incompetent, improper, immaterial and hearsay, and ex parte operation taken without knowledge on the part of the defendant.

Overruled. Exception.

A. Received and marked Exhibit No. 5 of Nov. 7th, 1907.

Cross-examination by Mr. BRONNER:

1 Q. You are the plaintiff in this action?

A. Yes, sir.

2 Q. Before the commencement of this suit you began a suit in the Supreme Court of this state against this same defendant upon this same cause of action, did you not?

Mr. COOKINHAM: I object to it as incompetent, immaterial, improper and not cross-examination.

A. Yes, sir. I did.

3 Q. It is also true, is it not, that after that action was at
83 issue, and had been on the calendar for several terms of court for trial, you caused it to be discontinued?

Mr. COOKINHAM: Objected to on the same grounds as above.

A. I did.

4 Q. Who paid the expenses of that suit, including compensation of your attorneys, and the costs of the discontinuance?

Mr. COOKINHAM: Objected to on the same grounds as given above.

A. I do not know. It was not the bankrupt estate.

5 Q. Is the bankrupt estate paying your attorneys in this suit?

Mr. COOKINHAM: Same objection as above.

A. It is not.

6 Q. Do you understand, or are you informed that Joseph T. Wooster, of Newport, N. Y., or some person or persons represented by him, paid the expenses of the former suit in the Supreme Court, and is paying the expenses of this suit?

Mr. COOKINHAM: Objected to as incompetent, irrelevant, immaterial, hearsay and not cross-examination.

A. I do not know. I understand that Mr. Wooster paid those costs of the old suit, and is paying the expenses of this suit. It is distinctly understood that this present action should be without expense to the bankrupt estate.

Mr. COOKINHAM: I move to strike out separately each answer made by the witness to each interrogatory of the counsel for the defendant, upon the ground that each is incompetent, immaterial, irrelevant, improper and not cross-examination.

Redirect examination by Mr. COOKINHAM:

1 Q. You are in the office of Charles A. Miller, lawyer of Utica, N. Y., are you not?

A. I am.

84 2 Q. Is it in the way of employment or partnership?

A. Employment.

3 Q. Mr. Charles A. Miller is a director of the defendant is he not, and has been for some years past?

A. I understand that he is.

4 Q. And Mr. Miller, Mr. Burrell and Mr. Bronner were instrumental in settling up the affairs of the Titus Sheard Co., were they not?

A. I do not know.

5 Q. Do you find among the debts proven in their names three notes of $5,000 each?

A. Yes.

Hearing adjourned to November 13th, 1907, at 10 o'clock, A. M.

Hearing continued, November 13th, 1907, at 10 o'clock A. M. Same appearances.

FRANK SENIOR, recalled by Complainant and examined by Mr. Cookinham:

1 Q. Do you ever remember of there being any director's meeting of the Newport Knitting Co., except immediately following the stockholder's meeting held each year for the election of directors?

A. Not that I recollect.

2 Q. Examine Ex. A for identification and see if you can find any record of any director's meeting recorded there during the existence of the Company?

A. Yes.

3 Q. Please refer to them and tell what dates they were?

A. Dec. 3rd, 1901; Dec. 2, 1902.

4 Q. In that record book do you find any reference to the issuing of stock in certificates of $2,000 each to Frank Senior, Titus Sheard, H. P. Snyder, Weyman Walker, E. I. Stinson?

Mr. BRONNER: Objected to as incompetent, improper and immaterial. The book is better evidence.

Overruled. Exception.

85 A. No, I do not.

5 Q. Were there any papers left with the Titus Sheard Co. which belonged to the Newport Knitting Co.; I mean by that, paid notes, receipted bills, deeds or anything of that kind?

A. Not to my knowledge.

6 Q. Do you know what became of the note of the Newport Knitting Co. of $5,000 discounted by the defendant, and paid on the 26th day of September, 1903, by the check of the Titus Sheard Co.?

A. No, sir.

7 Q. Are there any papers now belonging to the Newport Knitting Co. in the possession of the Rex Knitting Co. and which came into their possession by virtue of the fact that they occupied the plant of the old Titus Sheard Co.?

A. Not that I know of.

8 Q. Where are the papers and records of the old Titus Sheard Co. kept?

A. I think they are largely in the storehouse of the Rex Knitting Co.

9 Q. Who has control of them?

A. I don't know I am sure.

10 Q. Do you have anything to say in regard to them?

A. I don't suppose I do.

Mr. COOKINHAM: I offer Certified Copy of Agreement, dated May 15, 1900, between Willard A. Ingham and others and The Newport Knitting Co., recorded in the Herkimer County Clerk's office, July 22, 1901, Book 3 of Miscellaneous Records, page 8.

Mr. MILLS: Objected to as incompetent, irrelevant and immaterial.

Overruled. Exception.

Received and marked Ex. 5 as of Nov. 13th, 1907. It is as follows:

Articles of Agreement made and entered into this 15th day of May, 1900, between Willard A. Ingham, Daniel P. Wooster, Henry W. Dexter, Benton K. Brown, John B. Lankton, David B. Ackley, William D. Grant, Dexter W. Smith, Millard N. Pearce and Charles L. Fellows, all of Newport, Herkimer County, New York,

86 parties of the first part, and the Newport Knitting Mill Company, a corporation to be formed, and now represented by the Hon. Titus Sheard of Little Falls, New York, party of the second part.

Witnesseth: That the parties of the first part for and in consideration of the covenants and agreements hereinafter specified, hereby agree to and with the party of the second part to convey the property lately owned by the Newport Improvement Company located in the Village of Newport, N. Y., together with a mill or building to be erected on said premises by the parties of the first part, according to the plans and specifications drawn by Architect Cronck, now in possession of the parties of the first part, and in all manner according to said plans and specifications, except that the building shall be forty feet in width and one hundred and thirty-two feet in length, and mullion windows, or sash 2 lighters, lights 12 x 16, to be used in the place of those stated in said specifications, and to deliver said property completed to the party of the second part on October 1st, 1900, unless prevented by circumstances beyond the control of the parties of the first part.

In consideration of the foregoing agreement on the part of the parties of the first part, the party of the second part covenants and agrees to equip said building and run twenty-five knitting machines for a period of five years, three hundred days in each year, and all goods are to be knit and finished at this mill, and the mill to be run to its capacity, excepting when the party of the second part is unable to do so by circumstances beyond its control. When the mill is operated beyond the capacity above specified of twenty-five machines, or when the same machines or any number are operated to exceed ten hours per day, the said excess of operation and production shall be counted as part of the time specified, viz.: 300 days in any one year. A committee to be appointed by the parties
87 hereto shall take notice of any such excess and at the end of each year shall account for the number of days operated on the basis aforesaid of 25 knitting machines, and ten hours per day, and certify to such accounting, which if in the aggregate equal three hundred days it shall be stipulated by said Committee that the party of the second part has performed its part of the contract or agreement.

As a further consideration for this agreement the party of the second part covenants and agrees to replace the building to be erected on the premises heretofore mentioned, and to be conveyed, in case of loss or destruction by fire within five years from the 1st day of October, 1900, or within five years from the date of the occupation of said building by the party of the second part.

In witness whereof, the parties hereto have hereunto set their hands the day and year first above written.

Signed and executed in duplicate.

W. A. INGHAM.
D. P. WOOSTER.
B. K. BROWN.
H. W. DEXTER.
D. W. SMITH.
J. B. LANKTON.
D. B. ACKLEY.
W. D. GRANT.
CHARLES L. FELLOWS.
M. N. PEARCE.

*Parties of the First Part.*

Party of the Second Part, NEWPORT KNITTING MILLS CO.,
By TITUS SHEARD.

STATE OF NEW YORK,
*County of Herkimer, ss:*

This is to certify that the parties of the first part, to the within contract, have performed all the conditions of said contract on their part, and have transferred the property therein described through H. I. Grant and wife and West Brothers to the Newport
88 Knitting Company. That the name of Newport Knitting Mill Company has been changed to the Newport Knitting Company, and said Newport Knitting Company in consideration of the transfer of said property to them do hereby assume all the conditions and liabilities therein stated by the Newport Knitting Mills Company, and agree to perform the same.

In witness whereof, the said Newport Knitting Company have this 6th day of November, 1900, caused these presents to be subscribed by the president, Titus Sheard, and the seal of said Company to be hereto affixed.

[L. S.] NEWPORT KNITTING COMPANY,
TITUS SHEARD, *Pres't.*

Here follows due proof of execution.
Recorded July 22, 1901, at 10:25 a. m.

DONALD G. MCINTYRE, being duly sworn, and called by complainant, testified as follows:

Mr. COOKINHAM:

1 Q. Where do you live and what is your business, and how long have you followed that business?

A. My residence 155 Park Ave., Utica, N. Y. My business expert accountant. For 40 years at different times, a large portion of the time being in permanent position as bookkeeper and accountant.

2 Q. Have you made an examination of the books of the Newport Knitting Co. in regard to some items?

A. I have.

3 Q. Did you examine books to ascertain the condition of the account between the Newport Knitting Co. and the Titus Sheard Co. on Sept. 26, 1903?

A. Yes.

4 Q. Please state how the account stood?

Mr. BRONNER: Objected to as incompetent, improper and immaterial, and no foundation laid. Also hearsay.

Overruled exception.

89 A. On the morning of Sept. 26, 1903, the account of the Titus Sheard Co. showed a debit of $4,429.71; that showed that Titus Sheard Co. owed the Newport Knitting Co. that amount. Titus Sheard Co. were debited to Sept. 26 to Oct. 1st $1,068.10. On Sept. 26 Titus Sheard Co. was credited with notes payable $5,000 less interest $46.57, leaving the net credit of $4,952.43. They were also credited with Titus Sheard personal account $760, and Titus

Sheard Co. purchase account $585.72. This shows a balance to Titus Sheard Co. Sept. 26, 1903, of $801.24. On Oct. 8, 1903, the item of $585.72 credited as T. Sheard Co. purchase account is charged back to T. Sheard Co. and credited to yarn account; deducting this from the former balance stated above, $801.24, the account shows an actual balance Sept. 26, 1903, of credit to Titus Sheard Co. of $215.52.

5 Q. Did you examine the books to see what accounts receivable there were on Sept. 26, 1903?

Mr. BRONNER: Objected to as incompetent, improper and immaterial.

A. I did.

6 Q. What did you find in that respect?

Mr. BRONNER: Same objection as last.

Overruled. Exception.

A. I found only 3 accounts receivable, namely, Titus Sheard Co., $3,655.46; Critten, Clift Co., $2,914.33; Michigan Condensed Milk Co., $15.09.

7 Q. Did you examine as to the personal account of Titus Sheard, and, if so, what did you find?

Mr. BRONNER: Objected to as incompetent, improper and immaterial, no foundation laid, and hearsay.

A. I did; account of Titus Sheard is credited to the following amounts: Nov. 30, 1902, traveling expense, $250; Dec. 30, $50.00, salary; Jan. 30, 1903, salary, $50; Feb. 28, salary, $50; Mar. 90 30, salary $50; Apr. 30, salary, $50; May 30, salary, $50; June 23, salary, $10; June 30, salary, $50.00; July 30, salary, $50.00; Aug. 30, salary, $50; Sept. 30, salary, $50, amounting to $760. Sept. 26, 1903, this amount was credited to the account of the Titus Sheard Co., and this account closed. Traveling expenses to amount of about $50.00 per month was paid prior to Nov. 30, 1902, to Titus Sheard, and charged direct to general expense account.

8 Q. Did you examine it with reference to 5 certificates of stock for $2,000, and, if so, what did you find in regard to that?

Mr. BRONNER: Objected to upon the same grounds as last objection.

Overruled. Exception.

A. I did; the only entry on the book in regard to real estate and buildings is that of Folio 1, Journal, Aug. 30, 1900, real estate and buildings to subscription account received of citizens of Newport, deed of mill and property, $10,000.

9 Q. In your statement of accounts receivable from Sept., 1903, to Jan. 1st, 1904, you did not take into account the counter credits, but simply gave the totals of the accounts receivable during that time, is that correct?

A. Yes.

Cross-examination by Mr. BRONNER:

1 Q. Do I understand you to say that the three accounts receivable which you mentioned on your direct-examination, represent the total charges to those accounts from Sept., 1903, to 1904, and do not pretend to give credit for the credits made to the same account during the same time?

A. Yes.

2 Q. Is it not true that if all the credits to Titus Sheard Co. account were taken into account, that the balance due to the Titus Sheard Co. would be $215.52?

A. Yes.

91 Redirect examination by Mr. COOKINHAM:

1 Q. What was the condition of the account of Critten, Clift & Co. subsequent to Sept. 26, 1903?

A. Critten, Clift Co. debits amounted to $2,914.33, and credits $3,012.18, showing a balance credit $97.85 Oct. 20th, 1903. The Critten, Clift Co. having a credit of $97.85 due them from Newport Knitting Co. at that date.

Adjourned to 2 o'clock p. m.
Recess for lunch.

Hearing continued at 2 o'clock p. m.
Same appearances.

DANIEL P. WOOSTER, being duly sworn and called for complainant, testified as follows:

1 Q. Mr. Wooster, where do you live, what is your occupation, and what has it been for more than seven years last past?

A. I reside in the Village of Newport, occupation teller of the National Bank of Newport. Have been for the last 27 years.

2 Q. Did you act as one of the committee to procure funds for the purpose of buying a site and building a building at Newport for the Newport Knitting Co.?

Mr. BRONNER: Objected to as incompetent, improper and immaterial.

Overruled. Exception.

A. I was.

3 Q. Who collected the money in the main from the subscribers for that purpose?

Mr. BRONNER: Same objection as last.

Overruled. Exception.

92 A. I collected the most of it.

4 Q. How much was collected in money, labor and material?

Mr. BRONNER: Same objection as last.

Overruled. Exception.

A. Something like $8,077, if my recollection serves me right.

5 Q. Of whom did the committee purchase the real estate?

A. Of W. D. Grant and Francis Grant.

6 Q. What did the committee do with reference to a building upon this plant?

A. We bought the lumber and built it.

7 Q. After the building was completed, to whom did you have it deeded?

A. To the Newport Knitting Co.

8 Q. Did any of the committee or the subscribers to the fund receive any consideration for what they did in this regard; if so, what?

A. Yes, we paid Mr. Baxter $175 for superintending the work. But nothing was received from any of them from the Newport Knitting Co.

9 Q. How much did the property cost the committee?

Mr. BRONNER: Objected to as incompetent, improper and immaterial.

A. They paid W. D. Grant $1,500 for the site.

10 Q. How much did the building cost?

A. The building cost $7,077. Labor was donated.

11 Q. So that the entire expenses of the committee, for the land and the building of the factory was how much in round numbers?

A. $8,577.

12 Q. This property was deeded to the Newport Knitting Co. and the committee did nothing in regard to the property after that, did it?

A. Not a thing.

13 Q. Did the committee make any arrangement with the Newport Knitting Co., or with Titus Sheard, Frank Senior, E. I. Stinson, Weyman Walker or H. P. Snyder, of any kind, in regard to
93 the issuing of capital stock to any of these gentlemen in consideration of this real estate?

Mr. BRONNER: Objected to as incompetent, improper, immaterial, and calls for an opinion of the witness.

Overruled. Exception.

A. They did not.

Mr. COOKINHAM: I offer in evidence certified copy of deed given by William D. Grant and Francis Grant to the Newport Knitting Co., dated Nov. 1st, 1900, recorded in Herkimer County Clerk's Office, Dec. 31, 1900, in Book of Deeds 173, page 491.

Overruled. Exception.

Hereunto attached and marked Exhibit 6.

Mr. COOKINHAM: I offer in evidence Quitclaim deed of George West and Eugene West, copartners, to Newport Knitting Co., dated April 24, 1900, recorded in Herkimer County Clerk's Office, Dec. 31, 1900, in Book 162 of Deeds, page 351.

Overruled. Exception.

Hereto attached and marked Exhibit 7.

Mr. COOKINHAM: I offer in evidence waiver, given by Eugene West and George West to Newport Knitting Co., dated Feb. 23rd, 1901, recorded March 21, 1901, in Book 174 of Deeds, page 376.

Overruled. Exception.
Hereto attached and marked Exhibit 8.

14 Q. You understand what was conveyed by this deed from West Bros. to Newport Knitting Co., do you not?
A. I do.
15 Q. How much was paid for this deed?
A. Nothing.

Mr. COOKINHAM: I offer in evidence deed from Patrick Toomey and Bridget Toomey to the Newport Knitting Co., dated Nov.
94 12, 1901, recorded in Herkimer Co. Clerk's Office, Nov. 15, 1901, in Book 171 of Deeds, at page 564.
Overruled. Exception.
Hereto attached and marked Exhibit 9.

16 Q. You know what property this deed covers?
A. I do.
17 Q. And you know what was paid for this property?
A. I understood from Titus Sheard that $100 was paid.
18 Q. When did you go into the plant of the Newport Knitting Co. after the appointment of Mr. Stinson as receiver?
A. Immediately after hearing of the appointment.
19 Q. At that time were there in the office of the Newport Knitting Company any papers, such as unpaid bills, or receipted bills, or other evidences of accounts, and if so, what?
A. Merely a shipping book.

Cross-examination by Mr. BRONNER:

1 Q. Was there a subscription paper made upon which this money was raised for the purchase of this property?
A. There was.
2 Q. Is this document which I show you dated Apr. 4, 1900, purported to be signed by Newell, Morey and others, the subscription paper?
A. Yes, sir.
3 Q. I offer the heading of the paper, identified by the witness in evidence, which reads as follows:

"We, the undersigned, subscribe and agree to pay the sum set opposite of our respective names to the National Bank of Newport, as Treasurer of the 'Building Committee' of the citizens of the village of Newport, N. Y., to be used by said Committee in the purchase of a site for the mill proposed to be managed by a Company to be organized by the Honorable Titus Sheard of Little Falls, N. Y., and for the erection of a building on the site which may be
95 purchased. Said money so raised to be at the disposal of the 'Building Committee' and to be used by them as a majority of the said Committee may deem best for the interests of the village of Newport, N. Y.
Dated April 4th, 1900."

4 Q. Who were the Building Committee referred to in the paper we have just spoken of?

A. Willard Ingham, H. W. Dexter, Benton K. Brown, myself, L. B. Tuttle, M. M. Pearce, W. D. Grant, J. B. Lankton and David B. Ackley, Dexter W. Smith, Charles L. Fellows.

5 Q. Did this committee that you have named or named a part of them, discuss, consider and decide upon the different steps taken by the committee with reference to the purchase of the property, the building of the building, and the conveyance of same to the Newport Knitting Co.?

A. Yes.

6 Q. Did that Committee in that way authorize the execution of the agreement between Willard A. Ingham and others to The Newport Knitting Co. dated May 15th, 1900?

A. They did.

7 Q. After the making of that agreement, did the Committee request Mr. W. D. Grant and Francis Grant, Eugene West and George West, to execute the conveyances of the real estate to The Newport Knitting Co.?

A. They did.

8 Q. In these different transactions with The Newport Knitting Co., with reference to the purchase of the property, the building of the building, and the conveyances thereof to The Newport Knitting Co., who represented The Newport Knitting Co. before the Committee?

A. Hon. Titus Sheard.

9 Q. Were these different conveyances, spoken of, to The Newport Knitting Co., made after the same had been considered by the Building Committee on one side, and Titus Sheard for The Newport Knitting Co. on the other?

A. There was only one meeting with Titus Sheard and the Building Committee proper.

10 Q. Was there some sub-committee?

96 A. Mr. Brown and myself went to Little Falls to see Titus Sheard and Frank Senior in regard to making the purchase.

11 Q. Was Mr. Brown and yourself authorized by the full Committee to complete the transaction, and carry out the purposes for which the money had been raised?

A. We were authorized to ascertain what sort of a building they could build, how they could raise the funds, and the means.

12 Q. After your sub-committee had reported to the full committee, who attended to the matter of how the title of the property was to be transferred to The Newport Knitting Co.?

A. It was at a full meeting of the Committee in connection with Titus Sheard.

The committee thought it best to have the deed made by W. D. Grant and wife to the Newport Knitting Co. rather than the Newport Building Committee take the title and transfer it to the Newport Knitting Co. in order to avoid the expense of but one deed.

13 A. Did Titus Sheard participate in the discussion before that meeting of the committee?

A. No, not on that subject.

14 Q. Was Titus Sheard present at that meeting of the Committee?

A. He was.

15 Q. Was the matter of when and how, and to whom the deed should be given, discussed there in his presence?

—. It was.

16 Q. Was the deed from W. D. Grant and the one from Eugene and George West executed and delivered after that deed?

A. It was.

17 Q. Was the Newport Knitting Co. incorporated on April 4, 1900, at the date when the subscription paper was made?

A. I have no means of knowing.

18 Q. In addition to the $8,577 which the Committee paid for the property, were there certain contributions to the building and property in the way of labor?

A. There was.

97 19 Q. Do you know about how much it amounted to?

A. I don't believe I could tell.

20 Q. Can't you approximate the amount?

A. $125.

21 Q. After the building had been completed, machinery and shafting was installed in the building, was it not?

A. It was.

22 Q. Who put this machinery, shafting, etc., into the building?

A. Newport Knitting Co.

23 Q. Do you know how much was laid out by the Newport Co. in the purchase of machinery and shafting for the plant?

A. Only by representations.

24 Q. Were you informed that the Newport Knitting Co. paid for the land purchased of Toomey?

A. I was.

25 Q. Do you know what rights or property was conveyed to the Newport Knitting Co. by the West deed?

A. 30 inches of water rights.

26 Q. State what was the value of the property and rights conveyed by the Wests to the Newport Knitting Co.?

A. It was practically of no value to it in one sense of the word.

27 Q. The Newport Knitting by the deed from Mr. Grant took 150 inches of water?

A. Yes.

28 Q. The Wests by their deed conveyed 30 more inches from the same head, did they not?

A. They did.

29 Q. The Committee paid for the premises purchased of Mr. Grant about $1,500?

A. They did.

30 Q. Is it not true, therefore, counting the water as a basis, that the water purchased of West would be one-fifth of the value of that purchased from Grant, amounting to $300?

Mr. COOKINHAM: I object to it as incompetent, immaterial, irrelevant, not cross-examination and assuming facts not proved.

A. It would be to the Newport Knitting Co.

98 31 Q. And what you meant a little while ago, you said that in one sense that the water rights purchased from West was not worth much of anything, you meant alone by itself, but that if added to the water rights owned by the Newport Knitting Co. it became of considerable more value.

A. I meant in that answer that the water rights in the hands of Mr. West was valueless to him; if added to 150 inches it would increase the power proportionately.

32 Q. Did you understand when you visited the mill office after Mr. Stinson had been appointed receiver, that he, as such receiver, had taken the books and papers belonging to the Newport Knitting Co. into his charge, and removed them from the building?

A. I so understood from Mr. Cahill, the supt.

Redirect examination by Mr. COOKINHAM:

1 Q. Was there ever a suggestion made by Mr. Sheard or Mr. Senior, or any of your committee, that the money to be raised to buy the site, was for the benefit of Mr. Sheard or any other individual?

A. There was not.

2 Q. The deed from W. D. Grant and wife to the Newport Knitting Co. conveyed land as well as water rights, did it not?

A. It did.

3 Q. In fixing a value upon the 30 inches of water covered by the West deed, you give it a value because it could be used in connection with the powers conveyed by the Grant deed, do you not?

A. We gave it a value because it increased the power of the Newport Knitting Co. to manufacture. We did.

4 Q. And no land was deeded by the West deed, was there?

A. Not as I understood it at the time.

99 Hearing continued, December 17th, 1907, at 11.30 o'clock a. m.

Appearances:

Henry J. Cookinham, for Complainant,
Myron G. Bronner and A. M. Mills, for Defendant.

GEORGE D. SMITH, recalled for the Complainant, testified as follows:

Mr. COOKINHAM: I offer in evidence paper dated Little Falls, N. Y., August 8, 1903, signed by Titus Sheard Co., Frank Senior, Treas., Titus Sheard, Frank Senior, Edwin I. Stinson, with the papers attached to it.

Mr. BRONNER: I object to it as incompetent, improper and immaterial.

Overruled. Exception.

Received and marked Exhibit 10, Dec. 17, 1907.

The paper is as follows:

"LITTLE FALLS, N. Y., *August* 8, 1903.

Bills Payable.

| Due. | | | |
|---|---|---|---|
| Aug. | 10. | Discount, Corn Exchange Bank | $10,000.00 |
| " | 17. | Discount, Bogart | 5,000.00 |
| " | 20. | Gilbert Ktg. Co. | 2,093.45 |
| " | 24. | Discount, Bogart | 5,000.00 |
| " | 31. | Discount, Sold by N. Y. Nat. Ex. Bank | 5,000.00 |
| " | 20. | S. F. Jones | 594.79 |
| Sept. | 11. | Discount, Nat. Her. Co. (Senior) | 5,000.00 |
| " | 14. | Discount, Richfield | 5,000.00 |
| " | 23. | Crefeld Waste & Batting Co. | 1,069.55 |
| " | 28. | S. F. Jones | 614.24 |
| " | 29. | Discount, Lawrence | 5,000.00 |
| | Sept. 29. | Discount, Milwaukee | 20,000.00 |
| 100 | Oct. 5. | Discount, Nat. Her. Co. Bank | 5,000.00 |
| | " 10. | " " " " " | 7,500.00 |
| Oct. | 15. | S. F. Jones | 504.11 |
| " | 16. | Discount, N. Y. Nat. Ex. Bank | 10,000.00 |
| " | 19. | Discount, Nat. Her. Co. Banks | 2,750.00 |
| " | 19. | Ballston | 5,000.00 |
| " | 19. | Robt. MacKinnon & Co. | 2,336.83 |
| " | 26. | Discount, Nat. Her. Co. Bank | 5,000.00 |
| " | 29. | " N. Y. Nat. Ex. Bank | 5,000.00 |
| " | 29. | " Nat. Her. Co. Bank | 4,000.00 |
| Nov. | 1. | " Am. Ex. Nat. Bank | 15,000.00 |
| " | 2. | " N. Y. Nat. Ex. Bank | 10,000.00 |
| " | 2. | " Nat. Her. Co. Bank (Sheard) | 5,000.00 |
| " | 9. | " " " " " (Senior) | 10,000.00 |
| " | 10. | G. W. Kavanaugh | 3,402.10 |
| " | 13. | Discount, Nat. Her. Co. Bank | 10,000.00 |
| " | 15. | Utica Knitting Co. | 5,422.60 |
| " | 20. | " " " | 7,160.95 |
| " | 25. | Gilbert Ktg. Co. | 5,000.00 |
| " | 27. | Discount, Bogart | 5,000.00 |
| Dec. | 18. | " " | 5,000.00 |
| " | 23. | " Gloversville | 15,000.00 |
| " | 28. | " Bogart | 5,000.00 |
| Jan. | 7. | " Park Bank | 5,000.00 |
| | | | $217,148.62 |

| | | | |
|---|---|---|---|
| Also | | | |
| E. I. Stinson | $23,000.00 | Collateral | C. N. R. R. Stock |
| Mrs. Stinson | 20,000.00 | " | Watertown Ins. Co. |
| | $43,000.00 | Shortage on collateral | $16,000.00 |
| Also | | | |
| Watertown Loan | $38,750.00 | Collateral | $34,000.00 |

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LITTLE FALLS, N. Y., *Aug.* 8, 1903.

*Made up From Statement of July 1st, 1903.*

| | | |
|---|---|---|
| Cash on hand and in Banks | | $5,139.28 |
| Notes Receivable | | 11,562.61 |
| Customer's A/c's Rec | $40,237.48 | |
| Less offsets to Purchaser's A/c's | 4,600.22 | |
| | | 35,637.26 |
| H. P. Snyder Sales A/c's | $26,628.01 | |
| Less goods hypothecated | 15,555.25 | |
| | $11,072.76 | |
| Less bal. C. C. & Co | 6,746.99 | |
| | | 4,325.77 |
| Accounts Payable | $31,435.00 | |
| Less offsets from "Sales Acc't" | 4,600.22 | |
| | | 26,834.78 |
| Mdse. Notes Payable | $21,522.29 | |
| Less Goods not del. by U. K. Co | 5,724.00 | |
| | | 15,798.29 |
| Loans and Discounts | 212,376.96 | |
| As follows: | | |
| Individual | $8,126.96 | |
| Nat. Herk. Co. Bank | 24,250.00 | |
| Nat. Herk. Co. Bank (Senior) | 25,000.00 | |
| Nat. Herk. Co. Bank (Sheard) | 5,000.00 | |
| N. Y. Nat. Ex. Bank | 25,000.00 | |
| Outside | 125,000.00 | |
| | $212,376.96 | |
| Collateral Loans: | | |
| 484 Shares C. N. R. R. Stock | | 23,000.00 |
| 100 " Agricultural | | 20,000.00 |
| Mdse. | | 17,275.00 |

TITUS SHEARD CO.,
FRANK SENIOR, *Treas.*

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LITTLE FALLS, N. Y., *Aug.* 8, 1903.

*Resources.*

Statement Based Upon July 1st, 1903, Inventory.

| | | |
|---|---|---|
| Cash on hand and in Banks | $5,139.28 | |
| Notes Receivable (good) | 11,562.61 | |
| Accounts Receivable (good) | 39,963.03 | |
| Actual Inventory | 160,000.00 | |
| Critten-Clift & Co.'s notes | 10,000.00 | |
| Snyder Co.'s Stock (par $15,000.00) | 25,000.00 | |
| Real estate other than Mill & Warehouse | 18,000.00 | |
| Total | $269,664.92 | $269,664.92 |

*Liabilities.*

| | | |
|---|---|---|
| Accounts Payable | $26,834.78 | |
| Merchandise Notes Payable | 15,798.29 | |
| Loans and Discounts | 212,376.96 | |
| Total | $255,010.03 | 255,010.03 |
| Surplus | | $14,654.89 |
| Adding the mill, machinery and warehouse, say at | | $50,000.00 |
| Total surplus | | 64,654.80 |
| Less Shortage on Collateral Loans, say | | 20,000.00 |
| Net surplus | | $44,654.80 |

In the list of liabilities there is not included the money borrowed at Watertown, amounting to $38,750.00. The collateral to same amounts to $34,000.00, calling the National Herkimer Co. Bank Stock which they hold, seventy-five shares, $160.—$12,000.—Then they have the first mortgage on the Snyder Real Estate of nine thousand dollars, and other items amounting to thirteen thousand.—The balance of collateral which Watertown holds is the T. S. Co.'s stock.

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Mr. S—— has life insurance $35,000.00, premium paid to Feb'y Mch. & April, 1904, same being assigned to his wife, but he says that she will very cheerfully release same if we wish to take it over as collateral security.

Enclosed is the list of Bills Payable. This together with the Watertown debt includes everything, except that he is an endorser on the Newport Company's note of five thousand held by the National Herkimer County Bank, but he says that he will pay it.

The real estate given above at $18,000.00 comprises as follows:

| | |
|---|---|
| High Street | $1,000.00 |
| Birch Street, two house- and lot | 2,500.00 |
| William St. | 3,000.00 |
| Main St. | 2,000.00 |
| Main St. (store and house, worth $13,000, mortgaged for six, equity say | 6,000.00 |
| Phillips House | 800.00 |
| Two houses and property at Dam | 2,500.00 |
| Broderick Property and three other lots | 1,800.00 |
| | $19,600.00 |

which we called $18,000.00.

TITUS SHEARD CO.,
FRANK SENIOR, *Treas.*

104 LITTLE FALLS, *Aug. 8th*, 1903.

Whereas we, Titus Sheard Co. are indebted to the National Herkimer County Bank for accommodations, as per statement hereto attached;

And whereas, we have determined to liquidate our business, and to pay up all our debts of every name and nature;

And whereas, some further accommodations from the Bank, or from some of the individual Directors of the Bank, for which we will give security, may be necessary in order to enable us to carry out our plan in the most effective manner, having in view realizing the largest amount possible from the Company and individual assets;

Now, therefore, for one dollar cash in hand paid to us by the National Herkimer County Bank, the receipt of which is hereby acknowledged, and for other valuable considerations, we, the Titus Sheard Co., and we Titus Sheard, Frank Senior and E. I. Stinson, stockholders of said Company, hereby covenant and agree as follows:

We will enthusiastically, energetically, and industriously devote our whole time to disposing of the assets of our Company, and of ourselves individually, as per the attached list of merchandise, real estate and stocks, and devote the net proceeds as fast as realized in payment of our indebtedness to the National Herkimer County Bank and our other creditors.

With reference to Bills Payable held by creditors outside of the National Herkimer County Bank, we will renew same in whole or in part as may be found possible as long as may be necessary, and pay the balance not required in so doing to the National Herkimer County Bank in cancelling the notes held by it. All monies received to be used in the payment of said indebtedness as fast as realized. If we do not succeed in collecting the proceeds of
105 merchandise sold fast enough to meet Bills Payable held by creditors outside of the National Herkimer County Bank, then the Directors individually, or the Bank, for fresh money required, to be given security, and to supply the funds necessary to pay same so that paper shall not go to protest.

The annexed statement of Bills Payable we certify to be correct, and we agree that no new notes or Bills Payable shall be given except with the knowledge and consent of the officers of the National Herkimer County Bank.

We agree that all surplus monies as fast as collected, not required to pay the outstanding notes held by other creditors, shall be applied in payment of our indebtedness to the National Herkimer County Bank, and we hereby pledge our mill property, all the machinery in same, and the warehouse, together with all our assets of our Company, and also the individual properties, as per list herto attached, to secure the National Herkimer County Bank for all notes of ours which they now hold, or may hereafter hold, and for all paper endorsed by us now held by the Bank, or that may be held by it in the future, and we will consider the trust reposed in us in the settlement of our affairs for the benefit of the National Herkimer County Bank as a sacred trust, and will carry out faithfully the purposes as expressed in this paper, and we hereby declare it to be our intention

to sell all merchandise and all our real estate, so far as may be necessary in order to pay off all our indebtedness, before the begining of the year, and will work faithfully to convert all our property into money and to pay the National Herkimer County Bank and its individual directors in full before the 1st of Jan., 1904

Further, there is thirty-five thousand dollars of life insurance assigned to Mrs. Sheard. This can be also pledged as additional security for the Bank, as Mrs. Sheard will cheerfully consent thereto.

Executed Aug. 11th, 1903. D. H. B., by Titus Sheard, Frank Senior, Edwin I. Stinson, Titus Sheard Co., Frank Senior, Treas.

106 Mr. COOKINHAM: I offer in evidence a Letter, dated August 7, 1903, to David H. Burrell, signed by Chas. A. Miller.

Mr. BRONNER: Objected to as incompetent, improper and immaterial; this paper and the one preceding it not objected to on the ground that the signature is not proved.

Overruled. Exception.

Received and marked Exhibit 11, as of Dec. 17, 1907. The letter is as follows:

"AUGUST 7TH, 1903.

David H. Burrell, Esq., Little Falls, N. Y.

MY DEAR MR. BURRELL: I have carefully considered the matter which you brought to my attention in our conversation this morning, and it seems to me that the whole matter of extending additional assistance to the customer of the bank, referred to in that conversation, depends upon his making an absolutely full and frank statement of his affairs to some one representing the bank. If he does not desire to do this in such a way that it becomes known to the entire board, he could select yourself or Mr. Smith, and make a complete statement to you in such a way that you might be able to assure the board that his quick assets, if properly handled, were sufficient to meet all of his liabilities. If such a statement should be made, and such a state of affairs disclosed, I think the bank should take over the assets in some form or other, and assume the liabilities as they become due, and gradually close out the business for the interests of all persons concerned.

Yours very truly,

CHAS. A. MILLER."

107 Mr. COOKINHAM: I offer in evidence another letter of the same date, including the statement attached to it, to Mr. Burrell and signed by Chas. A. Miller.

Mr. BRONNER: Same objection.

Overruled. Exception.

Received and marked Exhibit 12, as of Dec. 17, 1907.

The letter is as follows:

"AUGUST 7TH, 1903.

David H. Burrell, Esq., Little Falls, N. Y.

MY DEAR MR. BURRELL: Since talking with you I have drafted a plant of liquidation, which, subject to certain changes which might

suggest themselves, and subject to any changes which might be made necessary on knowing the exact figures in the matter, seems to me to present a possible method of getting out of our difficulties, and still preserving the buying and selling end of the business for our customer, as could not be done otherwise. It is hastily drafted, however, and I only throw it out as a possible suggestion.

The bank of course closes at noon tomorrow, and while I had planned to accept an invitation to lunch with Mr. Rogers in the country, I am willing to forego that, if you think it necessary for me to come to Little Falls. If you wish me to come down on the one o'clock train, please telephone me in the morning.

Yours truly,

CHAS. A. MILLER."

Suggestion of Plan for Financing and Winding up affairs of T. S. & Co. by Corporation.

From a corporation to be known as the T—— S—— Corporation, with Capital Stock of say, $152,000 of which $102,000 to be Preferred and $50,000 Common.

108 Let this corporation take over all assets of T. S., T. S. & Co. and the subsidiary Companies, including real estate, agreeing to pay all debts not to exceed $197,000, and paying for this purchase with 50,000 common stock to be issued the T. S.

The preferred stock (which the articles of incorporation shall provide shall be entitled to payment in full with 6% interest before any payment is made on the common stock) can then be used to take up the notes held by the National Herkimer Co. Bank, which would then hold all these assets really as security for its claim, subject only to the other indebtedness of $95,000.00.

Then let the T. S. Corporation issue bonds secured by real estate mortgages and the general assets of the Company for $95,000 at 6% and use these to liquidate the other outstanding indebtedness. These Bonds could run a year and would be amply secured and D. H. B. & Co. could take them with as great or greater security than they could re-discount for the Bank.

The Bank holding 2/3 of the stock could entirely control the policy of the Company, which would proceed immediately to dispose of the assets in such manner as would result in the least loss.

The sums received in this way would be applied—1st, to pay off the bonds, which should contain a provision permitting their redemption within the year.

After the bonds were paid the proceeds would be permitted to accumulate until enough had been realized to pay off the preferred stock with 6% interest or until all assets had been disposed of. The Company would then be dissolved or the preferred stock retired as might be thought best, and whatever remained, either in cash or assets, would belong to T. S. as the owner of the Common Stock.

This plan has the advantage over any other, that it would enable the business to be liquidated without the disturbance to the community which any assignment or appointment of a trustee

109 would be sure to entail, and it would also protect the Bank to the full extent of all assets subject only to the other out-

standing indebtedness. It also gives absolute security to D. H. B. & Co. and 6% instead of 5% on their advance.

Mr. COOKINHAM: I offer in evidence a letter dated Sept. 16, 1903, signed by D. H. Burrell to Charles A. Miller.

Mr. BRONNER: Objected to as incompetent, improper and immaterial. Not objected to on the ground that the signature is not proved.

Overruled. Exception.

Received and marked Exhibit 13, as of Dec. 17, 1907.

The letter is as follows:

"D. H. Burrell & Co., Little Falls, N. Y., U. S. A.,

*Sept.* 16, 1903.

DEAR MR. MILLER:—Senator Sheard, Mr. Senior and I had a session this morning. We went over matters pretty thoroughly, and I am glad to advise that the result of their inventory and statement as of September first, shows that they have a total of one hundred twenty-six thousand dollars of good bills receivable, of which twenty-two thousand is pledged, leaving one hundred and four thousand unpledged. The inventory of merchandies amounts to over one hundred thousand dollars. The balance sheet shows the same result as the statement which you have, that is, there is no change in the situation, excepting there was ten thousand dollars of the Critten, Clift & Co.'s paper which they had included twice, but the sale of goods in excess of the inventoried price, together with the two thousand odd dollars realized for machinery, more than makes up this item.

Regarding the Bank—It is agreed that the Cincinnati
110 Northern Railroad Stock, which we called seven thousand dollars, and the life insurance policies of thirty-five thousand, shall be attached to the twenty-three thousand E. I. Stinson's paper, with the understanding that they shall be considered sufficient to properly secure that amount of notes, although the life insurance policies are collateral to the entire indebtedness, and this is not changed in any way.

Mr. Sheard has also given us good bills receivable as collateral for a five thousand dollar note, which has matured and which we renewed with said new collateral.

Regarding the Newport Co.'s note, he is to give Titus Sheard Co.'s note with bills receivable as collateral, and take that up, which will get that piece of paper out of the way, and which is also in accordance with Mr. Sheard's wishes.

Further, just as fast as paper which we hold of Titus Sheard Co. matures, it will be paid, or if renewed, good collateral will be given, until all is secured down to twenty-five thousand dollars. The understanding and agreement being, however, as provided in that memorandum which was signed by the Titus Sheard Co. and its individual members on the 11th day of August, that all indebtedness to the Bank is to be paid in full by the first of January, 1904, and this

being done, the insurance policies and whatever collateral we may have is to be reassigned to Mrs. Sheard or the Titus Sheard Co. as arranged. I wrote to Mr. Sheard and also told him about our discussion with reference to the proposed mortgage, and I think he appreciates the confidence that we have in him and in the members of his company, and also believe that it is the best course to pursue.

Reference has been made to the sale of about two thousand dollars' worth of machinery. Mr. Senior has prepared a list of machinery that can be spared from the mill just as well as not, and carried at prices which are very low, but which amount in the aggregate to fifteen thousand dollars. The machines already sold out
111 of this list have brought quite considerable more than the prices Mr. Senior had carried them out at, and both Mr. Sheard and Mr. Senior are hopeful that this good work can be continued, and if fifteen thousand dollars can be realized for same, and if the warehouse building (for which another prospective buyer has been found) should sell for twenty-five thousand it would result in the business being wound up, it seems to me, leaving the mill and balance of the machinery free of debt.

Our interview was an exceedingly harmonious and kind one, and I think that Mr. Sheard appreciates all that we have intended to do in his interest in connection with the situation, which, to say the least, has been a pretty hard one for him to face. I have assured him of your sympathy and of the confidence which you have in him and in the members of his concern, and to which reference was made in the letters that I read to him.

Mr. Sheard and Mr. Senior both are agreed, I may say, with reference to the liquidation of the affairs of the company, as well as Mr. Sheard's personal matters, paying off all and every indebtedness as speedily as possible; that to the Bank to be accomplished by the beginning of the new year, and then I believe the program contemplates the reopening of the mill plant with some new machinery, and on a basis which it seems to me promises well for the future. As I understand the program, it is to sell all the old machinery, and all the new as well that can be spared, leaving the plant a ten set mill, and to bring it down to date it will require the addition of about three thousand dollars' worth of new machinery. In a former talk with Mr. Senior this is about as outlined, the confident expectation being that before very long the mill could be increased to a twenty set mill.

In short, the idea is to settle up in full by the first of January, 1904, and then make a new start.

112 Please let me know if all the foregoing meets with your aapproval.

Very truly yours,

(Signed) D. H. BURRELL.

Mr. Charles Miller, Utica, N. Y.

Mr. COOKINHAM: I offer a letter dated Sept. 19, 1903, to D. H. Burrell, signed Titus Sheard Co.

Mr. BRONNER: Objected to same as last.
Overruled. Exception.
Received and marked Exhibit 14, as of Dec. 17, 1907.
The letter is as follows:

"Titus Sheard Co.

LITTLE FALLS, N. Y., *Sept.* 19, 1903.

D. H. Burrell, Little Falls, N. Y.

MY DEAR MR. BURRELL: We have yours of the 17th, contents carefully noted; also copy of a letter to Mr. Miller, which we have gone over, and we think the same a little too sanguine for us to endorse.

It is our full intention to carry out both the letter and spirit of our agreement with you and the bank, which you refer to as executed August 11th.

We sincerely thank you for your confidence, and shall do all we can to retain it.

Very sincerely,

TITUS SHEARD CO."

Mr. COOKINHAM: I offer a letter dated Sept. 17, 1903, addressed "Dear Mr. Sheard" and signed D. H. Burrell.

Mr. BRONNER: Objected to same as last.

Overruled. *Objection.*

113 Received and marked Exhibit 15, as of Dec. 17, 1907.

The letter is as follows:

"SEPT. 17, 1903.

DEAR MR. SHEARD: Enclosed I hand you letter which I have addressed to Mr. Miller to-day. Will Mr. Senior and you go over same carefully and see if I have omitted anything?

I am sure Mr. Miller will be very happy to receive my letter, and I am hopeful that he will endorse what we talked.

Won't you please have Mr. Senior read carefully the paper which was executed on the 11th of August, and which I handed to you, so that he as well as yourself will understand fully its provisions.

Kindly return letter addressed to Mr. Miller as soon as possible, and if all right I will mail to him. I will send you a copy of same, if you desire.

Very truly yours, D. H. BURRELL."

Mr. COOKINHAM:

1 Q. Mr. Smith, did you examine to see whether or not the bank held specific securities for the $5,000 note of the Newport Knitting Co., which was paid Sept. 26, 1903, and if so, will you state what the specific security was?

A. I did not, because there was no way of telling, excepting what I knew about it myself as the collateral in such a case was always delivered back to the party, if there was any collateral left upon a

payment of the note. The collateral in this case, I have every reason to believe, and in fact know, that it was in the form of accounts receivable assigned to the bank. The invoices being stamped with the stamp as follows: "For value received (money advanced by our bankers) we hereby assign this account to the National
114 Herkimer County Bank of Little Falls, N. Y., and hereby direct that payment be made to them. (Signed) Titus Sheard Co."

2 Q. Are you able to state what specific accounts receivable was collateral to the note of $5,000 which was paid Sept. 26, 1903?

A. I am not.

3 Q. Have you anything at the bank that would show what accounts were collateral to that note, and if so, what?

A. I have not.

4 Q. Who acted for the bank in making the arrangement for Exhibit 10?

A. David H. Burrell, who was at the time president of the bank.

5 Q. How much did the bank receive upon its claim against the Titus Sheard Co.; what per cent.?

A. 100%, from the proceeds of collateral held by the bank in the form of accounts receivable, life insurance of Titus Sheard, and stocks.

6 Q. Can you state how much money the bank received from the life insurance, and the security turned over to the bank by Titus Sheard individually.

A. I should say $46,000 or $47,000.

Cross-examination by Mr. BRONNER:

1 Q. Was there any record of the accounts receivable assigned to the bank, as you have stated, for the $5,000 Newport Knitting Co. note, other than the account or bill itself with the assignment thereon?

A. There was not.

2 Q. Is it a fact when the note was paid on the 26th day of September, 1903, as you have testified, and the pledged accounts returned to the Titus Sheard Co., that the bank then had retained no record of what accounts had been assigned?

A. It is.

So far as the Complainant now knows, he rests.

January 17th, 1908. M. J. Bronner and H. J. Cookinham appear, and each say that they rest the case.

115 EXHIBIT 1.

(Cancelled Revenue Stamp, 10 cents.)

*Certificate of Incorporation.*

We, the undersigned, all being persons of ful- age and a- least two-thirds being citizens of the United States and at least one of us a resident of the State of New York, desiring to form a stock cor-

poration pursuant to the provisions of the business corporations law of the State of New York, Chapter XLI of the general laws of the State of New York, do hereby make, sign acknowledge and file this Certificate for that purpose as follows:

First. The name of the proposed Corporation is "The Newport Knitting Company."

Second. The purposes for which it is to be formed are to establish, operate and carry on a knitting mill, and woolen and cotton factory, and to manufacture, buy and sell in market, knit goods and fabrics, underwear, hosiery, cloths, yarn, wool, cotton, and those articles and materials which are used and useful in such manufacture, and to transact such business as is necessary or incident to the prosecution of the said manufacturing enterprise, and the purchase and sale of said goods and materials.

Third. The amount of the Capital Stock is Thirty Thousand (30,000) Dollars.

Fourth. The number of shares of which the Capital Stock shall consist is Three Hundred (300), and the amount of Capital with which said corporation will begin business is Thirty Thousand (30,000) Dollars.

Fifth. Its principal business office is to be located in the Town of Newport, in the County of Herkimer, State of New York.

116 Sixth. Its duration is to be Fifty (50) years.

Seventh. The number of its directors is to be Five (5).

Eighth. The names and postoffice addresses of the Directors for the first year are as follows:

| Names. | Post-office addresses. |
|---|---|
| Titus Sheard | Little Falls, Herkimer County, N. Y. |
| Frank Senior | Little Falls, Herkimer County, N. Y. |
| Homer P. Snyder | Little Falls, Herkimer County, N. Y. |
| Orville N. Purdy | Boston, Mass. |
| Edwin I. Stinson | Little Falls, Herkimer County, N. Y. |

Ninth. The names and postoffice addresses of the subscribers and the statement of the number of shares of stock which each agrees to take, in the corporation, are as follows:

| Names. | Post-office address. | Number of shares. |
|---|---|---|
| Titus Sheard | Little Falls, N. Y. | 120 |
| Frank Senior | Little Falls, N. Y. | 20 |
| Homer P. Snyder | Little Falls, N. Y. | 20 |
| Orville N. Purdy | Boston, Mass. | 120 |
| Edwin I. Stinson | Little Falls, N. Y. | 20 |

In witness whereof, We have made, signed, acknowledged and filed this Certificate this 30th day of August, 1900.

TITUS SHEARD.
FRANK SENIOR.
HOMER P. SNYDER.
ORVILLE N. PURDY.
EDWIN I. STINSON.

117 STATE OF NEW YORK,
*County of Herkimer, City of Little Falls, ss:*

On this 30th day of August, 1900, before me personally came Titus Sheard, Frank Senior, Homer P. Snyder and Edwin I. Stinson to me personally known to be the persons described in and who made and signed the foregoing Certificate and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

ROBERT F. LIVINGSTON,
*Notary Public in and for the County of Herkimer, N. Y.*

STATE OF MASSACHUSETTS,
*County of Suffolk, City of Boston, ss:*

On this 1st day of September, 1900, before me personally came Orville N. Purdy to me personally known to be the person described in and who made and signed the foregoing Certificate and duly acknowledged to me that he had made, signed and executed the same for the uses and purposes therein set forth.

[SEAL.] FRANK W. NASH,
*Notary Public.*

118 EXHIBIT No. 6.

*Warranty Deed.*

Dated November 1, 1900. Consideration One Dollar and Other Good and Valuable Consideration.

WILLIAM D. GRANT and FRANCES GRANT
to
THE NEWPORT KNITTING COMPANY.

Conveys:

All that piece or parcel of land situate lying and being in the Village of Newport and bounded and described as follows: Beginning at a point on the highway known as Mill street and on the southeasterly side thereof 36 feet 6 inches from the center of the old factory well: running thence in a southeasterly direction along a fence and face of a stone wall to a corner of said wall about 27 & ½ feet to the northeast corner of the Tannery building on premises hereby conveyed; thence easterly along said face of wall to the land of Lydia C. Barry; thence along the line of Lydia C. Barry's land, and the land of the heirs of James Pierce to the land of J. G. Barry; thence southwesterly along said Barry's line to the West Canada Creek; thence Northwesterly along said Creek to the corner of the Tannery Creek wall; thence northerly in a straight line to a point parallel with front of said Tannery building and 10 feet from the North west corner thereof thence North westerly in a straight line to Mill street 100 feet from the center of said Factory well; thence Northeasterly along said street 63 & ½ feet to the place of beginning,

with the privilege of drawing from the bulkhead near the Tannery building 150 cubic inches of water and more if necessary
119 for Tannery purposes, meaning thereby to convey 150 square inches for any manufacturing purposes, and the title conveying a spring of water from the lot owned by the widow of the late Joseph L. Hall, to said Tannery building and the right to take sufficient spring water from said lot for the use of said Tannery. Also to go upon said Hall lot at all times to lay or repair logs, or other means of conveying spring water on said lot to the title aforesaid. Said tile now runs from Mill street across the corner of said H. G. Burlingame's lot near the Factory Well: Said parties of the second part may at all times go upon said lot to repair said tile with the right to remove said tile from said lot and put them down along said Mill Street to and across the lot hereby conveyed to a point intersecting said tile on the lot hereby conveyed, but they shall do it at their own expense.

This deed is given subject to the duty and the party of the second part agrees to pay one-half expense of maintaining the bulk head and stone arch to the north west boundary of said Mill street, the head gates and side walls of the upper end of the race, leading from the Mill pond to said bulkhead, and one sixth of the expense of keeping and repairing the dam across said creek above the stone bridge. Excepting and reserving two pieces of said premises sold to Lydia C. Barry and James Pierce now included within the fences of the lands occupied by them respectively. Said described premises being the same premises formerly owned by the Newport Improvement Company Limited. The Committee known as the "Building Committee" having paid to the parties of the first part the sum of Eighteen Hundred—as a consideration for this transfer to the parties of the second part.

120 *Quit Claim Deed.*

Dated April 24, 1900. Consideration One Dollar and Other Consideration.

GEORGE WEST and EUGENE WEST, Copartners Doing Business Under the Firm Name of West Bros.,
to
NEWPORT KNITTING COMPANY.

Conveys:

Thirty inches of water to be taken from the same bulkhead from which West Brothers take (formerly) 150 inches of water, to propel the machinery in their Knitting Mill in the village of Newport, New York. Said 30 square inches of water is to be measured at the mouth of whatever wheel it may be conducted to for use.

Whereas, by an instrument in writing bearing date the 2nd day of October, 1889, Eugene West and George T. Woodin, Jr., of Herkimer, N. Y., entered into an agreement or lease with the Newport Improvement Company, Limited, for the use of the water power

and real property owned by said Newport Improvement Company, Limited, situated on the south side of Bridge Street in the Village of Newport, and bounded and described as follows, viz.: on the north by said Bridge Street; West by lands of George T. Woodin, Jr., South by West Canada Creek, and East by the lands of Lydia C. Barry and Patrick Toomey, being what was formerly known as the Tannery Property, which lease by its terms was to run for a period of forty nine years and

Whereas, one of the lessee- of said premises, George T. Woodin, Jr., did on the 20th day of July, 1890, assign and transfer
121 all his right, title and interest in and to said lease and the rights to be enjoyed under same, to George West, and at the same time retired from the firm of Woodin & West, the Newport Improvement Company, Limited, having consented to the substitution of the said George West in the place and stead of George T. Woodin, Jr., and the lease continued in the firm name of West Brothers, which said firm was composed of Eugene West and George West, up to October, 1895, at which time the buildings on said described premises were destroyed by fire, and

Whereas, the said described real property and water power was mortgaged by the Newport Improvement Company, Limited, to said West Brothers, and subsequently sold pursuant to a decree of foreclosure made and entered in the Supreme Court, at which sale the property was purchased by Benton K. Brown, the highest bidder at the sale, who has since conveyed said property to one William D. Grant, who has reconveyed said property to the Newport Knitting Company of Newport, N. Y., who are the present owners thereof.

Now, Therefore, In Consideration of the sum of One Dollar to us in hand paid by the Newport Knitting Company of Newport, N. Y., we, George West and Eugene West of the City of Syracuse, Onondaga County, N. Y., composing the firm of West Brothers, hereby waive all our right, title and interest in, and cancel said lease without recourse to us with the Newport Knitting Company, Limited, hereinbefore set forth, and which said lease is duly recorded in the office of the Clerk of Herkimer County, N. Y., June 20th, 1890, at eleven o'clock A. M., in Liber 139 of Deeds at page 435 & 436.

In Witness Whereof, we have hereunto set our hands and seals this 23rd day of February, 1901

GEO. WEST. [L. S.]
EUGENE WEST. [L. S.]

122 STATE OF NEW YORK,
*Onondaga County*, ss:

On this 5th day of March, 1901, before me personally came George West and Eugene West to me known to be the same persons described in and who signed and executed the foregoing instrument and they severally duly acknowledged that they executed the same.

WALDO WESTON,
*Notary Public, Onon. Co., N. Y.*

This Indenture, made the twelfth day of November in the year Nineteen hundred and one.

Between Patrick Toomey and Bridget Toomey, his wife, of the Town of Newport, County of Herkimer, and State of New York, parties of the first part, and the Newport Knitting Company, a domestic corporation, of Newport, N. Y., party of the second part.

Witnesseth, That the said parties of the first part, for and in consideration of the sum of One Dollar, lawful money of the United States, and other valuable considerations paid by the said party of the second part, do hereby remise, release and forever quit claim unto the said party of the second part, its successors and assigns forever.

All that certain piece or parcel of land in the village of Newport, County of Herkimer, and State of New York, lying west of the following described and hereby determined line: Beginning at the Southerly side of Bridge Street, in said village, at an iron driven into the ground at the Northwest corner of the village lot of parties of the first part and runs thence South 17 deg. 36 min. East, 150 feet to a point 27.87 feet from the northwest corner and 23.40 feet from the Northeast corner of the tower of the Newport Knit-
123 ting Company Mill, thence South 34 deg. east, 41.32 feet to a point 39.45 feet from the Northeast corner of the tower of the Newport Knitting Company Mill and 26.54 feet from the Northeast corner of the main part of said mill; said parcel is bounded on the west by the east line of the lands conveyed by Henry Burlingame to Luke Snell and W. A. Ingham and is a part of the village lot conveyed by said Burlingame to Patrick Toomey, one of the parties of the first part.

Together with the appurtenances and all the estate and rights of the said party of the first part, in and to the said premises.

To have and to hold the above granted, bargained and described premises, unto the said party of the second part, its successors and assigns, forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

DANIEL J. TOOMEY.

his
PATRICK x TOOMEY.

BRIDGET TOOMEY.

In the presence of
H. W. DEXTER.

Deed properly acknowledged.

(Endorsed:) Testimony.—G. W. R., U. S. J.—Filed Sept. 14, 1908.—W. S. Doolittle, Clerk.

124 *Statement of all Debts of Bankrupt.*

In re NEWPORT KNITTING COMPANY. In Bankruptcy. No. 1679.

SCHEDULE A. (1) No. —.

Statement of all Creditors Who are to be Paid in Full or to Whom Priority is Secured by Law.

| Claims which have priority. | Amount. |
|---|---|
| 1. Taxes and Debts due and owing the United States.... | ..... |
| 2. Taxes due and owing to the State of —— or to any County, District or Municipality thereof: | |
| C. E. Whitney, Collector, Newport, N. Y..... | $115 97 |
| 3. Wages due workmen, Clerks or Servants, to an amount not exceeding $300 each, earned within three months before filing the petition: | |
| None. | |
| 4. Other Debts having priority by law: | |
| None. | |
| Total ..... | 115 97 |

Insert in all cases, ledger page, names of creditors and their residence, if known or unknown, so state, when and where debt was contracted; nature and consideration of the Debt, and whether contracted as partner or joint contractor, and, if so, with whom.

This Schedule must be executed in triplicate.

FRANK SENIOR, *Petitioner.*

125 SCHEDULE A. (2) No. —.

*Creditors Holding Securities.*

(N. B.—Particulars of Securities held, with dates of same, and when they were given, to be stated under the names of the several Creditors, and also particulars concerning each Debt, as required by the Acts of Congress relating to Bankruptcy, whether contracted as partner or joint-contractor with any other person; and if so, with whom.)

| | Value of securities. | Amount of debts. |
|---|---|---|
| None ..... | $ | $ |
| None ..... | | |
| None ..... | | |
| None ..... | | |
| None ..... | | |
| **Total** ..... | | |

Insert in all cases ledger page, names of creditors and their residence, if known, if unknown, so state; also full description of securities, when and where debts were contracted.

This Schedule must be executed in triplicate.

FRANK SENIOR, *Petitioner.*

126 SCHEDULE A (3) No. —.

*Creditors Whose Claims are Unsecured.*

[N. B.—When the name and residence (or either) of any Drawer, Maker, Endorser or Holder of any Bill, or Note, etc., are unknown, the facts must be stated; and also the name and residence of the last Holder known to the Debtor. The Debt due to each Creditor must be stated in full, and any claim by way of Set-off stated in the Schedule of Property.]

| | Amount. |
|---|---|
| William B. Charles, Amsterdam, N. Y. | $1,809 90 |
| William B. Charles, " " | 1,312 86 |
| The S. Gray Co., Walpole, Mass. | 53 76 |
| The Mayo Mills, Mayodan, N. C. | 784 86 |
| The Skenandoa Cotton Co., Utica, N. Y. | 1,519 92 |
| Harvey Chalmers, Amsterdam, N. Y. | 228 00 |
| A. S. Hyde & Sons, No. 361-3 Broadway, New York City. | 116 89 |
| Quern Bros., No. 1,914 N. 4th St., Philadelphia, Pa. | 23 46 |
| Dresser & Olmstead, No. 343 Broadway, New York City. | 39 00 |
| Geo. W. Cavanaugh, Cohoes, N. Y. | 189 65 |
| " " " " " | 1,208 06 |
| American Raveler Co., Philmont, N. Y. | 1 35 |
| Herkimer Coal Co., Middleville, N. Y. | 108 90 |
| O. N. Purdy & Co., 290 Summer Ave., Boston, Mass. | 15 00 |
| The Singer Mfg. Co., Utica, N. Y. | 2 44 |
| Thomas Johnson, 26 North 5th St., Philadelphia, Pa. | 1 90 |
| The Crawford Mfg. Co., New Brunswick, N. J. | 1 76 |
| Utica Bag & Paper Co., Utica, N. Y. | 10 22 |
| Jewell Belting Co., Hartford, Ct. | 79 89 |
| John A. Larabee, Amsterdam, N. Y. | 31 45 |
| J. D. Lasher, Gloversville, N. Y. | 13 82 |
| Acme Paper Box Co., Herkimer, N. Y. | 579 22 |
| " " " " " | 838 41 |
| Critten, Clift Co., No. 48 Leonard St., New York City. | 300 00 |
| Theo. Tiedmann & Son, 73-77 Mercer St., New York City | 207 76 |
| Franklin Needle Co., Franklin, N. H. | 170 00 |
| Frank E. Kolb, Amsterdam, N. Y. | 74 01 |
| C. B. Barker & Co., No. 93 Reade St., New York City. | 147 58 |
| Hojn L. Thomson, Sons & Co., Troy, N. Y. | 142 70 |
| Arnold Hoffman & Co., 32 Broadway, New York City. | 169 89 |
| Dynamite Anti-Clorine Co., Rome, N. Y. | 21 80 |
| C. E. Whitney, Newport, N. Y. | 115 97 |
| Newport Electric Light & Power Co., Newport, N. Y. | 75 00 |

| | |
|---|---|
| Merrow Machine Co., Hartford, Ct. | 41 00 |
| Union Special Sewing Machine Co., No. 47 Leonard St., New York | 216 48 |
| Davis & Furber Machine Co., North Andover, Mass. | 75 |
| C. R. Snell, Herkimer, N. Y. | 1,500 00 |
| Catlin & Co., 245 Broadway, New York | 2,413 63 |
| Rome Box and Lumber Co., Rome, N. Y. | 417 12 |
| Titus Sheard Co. | 172 57 |
| Total | $15,156 98 |

Insert in all cases, ledger page, names of creditors and their residence, if known or unknown, so state, when and where debt was contracted; nature and consideration of the Debt, and whether any Judgment, Bond, Bill of Exchange, Promissory Note, &c., and whether contracted as partner or joint contractor, or with any other person; and, if so, with whom.

This Schedule must be executed in triplicate.

FRANK SENIOR, *Petitioner.*

127 SCHEDULE A (4) No. —.

*Liabilities on Notes or Bills Discounted, Which Ought to be Paid by the Drawers, Makers, Acceptors, or Indorsers.*

[N. B.—The dates of the Notes or Bills, and when due, with the Names, Residences, and the Business or Occupation of the Drawers, Makers or Acceptors thereof are to be set forth under the Names of the Holders. If the Names of the Holders are not known, the Name of the last Holder known to the Debtor shall be stated and his business and place of residence. The same particulars as to Notes or Bills on which the Debtor is liable as Endorser.]

| | Amount. |
|---|---|
| See Schedule "A" (5) | $ |
| Total | $ |

Insert in all cases, ledger page, names of holders as far as known; if unknown, so state; their residence, if known; if unknown, so state; place where debt was contracted; nature of liability; whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.

This Schedule must be executed in triplicate.

FRANK SENIOR, *Petitioner.*

128 SCHEDULE A. (5) No. —.

*Accommodation Paper.*

[N. B.—The Dates of the Notes or Bills, and when due, with the Names and Residences of the Drawers, Makers and Acceptors

thereof, are to be set forth under the Names of the Holders; if the Bankrupt be liable as Drawer, Maker, Acceptor or Endorser thereof, it is to be stated accordingly. If the Names of the Holders are not known, the Name of the last Holder known to the Debtor should be stated, with his residence. The same particulars as to other commercial paper.]

| | Amount. |
|---|---|
| A note dated June 5, 1903, made by Frank Senior, payable to the Newport Knitting Company, payable at the National Bank of Newport, four months after date, for $5,000, discounted and now held by said Bank. Made for accommodation of said corporation | $5,000 00 |
| A note dated June 10th, made by the Newport Knitting Co., payable to the order of "Ourselves" payable at the First National Bank of Ballston, N. Y., four months after date for $5,000, discounted by said Bank and now held by it. Indorsed by Titus Sheard, Little Falls, N. Y. | 5,000 00 |
| A note dated July 13th, 1903, made by the Newport Knitting Co., payable to the order of "Ourselves" payable four months after date, at the office of O. N. Purdy & Co., Boston, Mass., for $5,000, discounted by O. N. Purdy & Co., and now held by them | 5,000 00 |
| A note dated July 13th, 1903, purporting to be made by H. P. Snyder Mfg. Co., of Little Falls, N. Y., payable to the order of the Newport Knitting Co., four months after date, for $5,000, discounted by said Bank and now held by it. | 5,000 00 |
| A note dated July 17th, 1903, made by the Newport Knitting Co., payable to the order of Frank Senior four months after date, at the Herkimer National Bank of Herkimer, N. Y., for $5,000, discounted by said Bank and now held by it. Endorsed by Titus Sheard of Little Falls, N. Y. | 5,000 00 |
| A note dated July 24th, 1903, made by the Newport Knitting Co., payable to the order of "Ourselves" payable four months after date, at the Fulton County National Bank of Gloversville, N. Y., for $5,000, discounted and now held by said Bank. Endorsed by Titus Sheard of Little Falls, N. Y. | 5,000 00 |
| A note dated August 10th, 1903, made by the Newport Knitting Co., payable four months after date to the order of "Ourselves" at the First National Bank of Herkimer, N. Y. | 5,000 00 |
| A note dated August 13th, 1903, made by the Newport Knitting Co., payable to the order of "Ourselves" four months after date, at the Office of O. N. Purdy & Co., Boston, Mass., for $5,000, discounted by said O. N. Purdy & Company of Boston and now held by them | 5,000 00 |

| | |
|---|---|
| A note dated August 15th, 1903, made by Titus Sheard, payable to the order of the Newport Knitting Company, at the National Bank of Newport four months after date for $5,000, discounted by said Bank and now held by it | 5,000 00 |
| A note dated Sept. 14, 1903, made by the Newport Knitting Co., payable to the order of "Ourselves" at the National Bank of Newport, four months after date for $5,000, discounted by said Bank and now held by it | 5,000 00 |
| Total | $50,000 00 |

Insert in all cases, ledger page, names of holders, residence, if known, if unknown, so state; names of and residence of persons accommodated; place where contracted; whether liability was contracted as partner or joint contractor, or with any other person, and, if so, with whom.

FRANK SENIOR.

This Schedule must be executed in triplicate.

[N. B.—Oath as prescribed to Schedule A, to be annexed to this sheet.]

129 N. B.—The following form of Oath to Schedule A of the Petition by Debtor is prescribed and is to be annexed to the same.

*Oath to Schedule A.*

UNITED STATES OF AMERICA,
*Northern District of New York*, ss:

On this 11th day of Feb'y, A. D. 1904, before me personally came Frank Senior, the person mentioned in and who subscribed to the foregoing Schedule, and who being by me first duly sworn did declare the said Schedule to be a statement of all his debts of said corporation, in accordance with the Acts of Congress relating to Bankruptcy.

Subscribed and sworn to before me this 11th day of Feb'y, A. D. 1904.

BENJ. SULLIVAN,
*Notary Public*
(Official Character.)

This oath may be administered by officers authorized to administer oaths in proceedings before Courts of the United States, or under the laws of the State, where the same are to be taken; and diplomatic or consular officers of the United States in any foreign country.

To be attached to Schedule A, No. B. 706, after execution before proper officer.

Petitioner's attorney cannot act as notary.

Received in evidence and marked "Exhibit 3," October 25, 1907.

WM. E. SEAVEY.

130 United States District Court, Northern District of New York.

In the Matter of NEWPORT KNITTING COMPANY, Bankrupt.

At Utica in said District on the 20th Day of February, 1905.

*A List of Debts Proved and Claimed under the Bankruptcy of Newport Knitting Company, with a Dividend at the Rate of Fifteen Per Cent. This Day Declared Thereon by William H. Comstock, a Referee in Bankruptcy.*

Re NEWPORT KNITTING COMPANY.

List of Claims Filed.

| Creditor. | Sum proved. | Dividend. |
|---|---|---|
| Acme Paper Box Co. | $1,417.63 | $212.64 |
| American Raveler Co. | 1.35 | .20 |
| Arnold, Hoffman & Co. | 169.89 | 25.47 |
| Barker (C. B.) & Co. | 147.58 | 22.13 |
| Cahill, Wm. E. | 506.50 ? | |
| Catlin & Co. | 2,414.74 | 362.21 |
| Charles, Wm. B. | 3,088.57 | 463.28 |
| Crawford (The) Mfg. Co. | 1.76 | .27 |
| Chalmers, Harvey | 228.00 | 34.20 |
| Dexter, Dr. L. C. | 50.00 | 7.50 |
| Dresser & Olmstead | 39.00 | 5.85 |
| Dynamite-Anti Clorine Co. | 21.80 | 3.28 |
| Franklin Needle Co. | 170.00 | 25.50 |
| Gray, The S. Co. | 53.76 | 8.06 |
| Hyde, A. S. & Co. | 116.89 | 17.53 |
| Herkimer Coal Co. | 108.90 | 16.35 |
| Horton, Robert E. | 28.39 | 4.24 |
| Irving & Leiper Mfg. Co., The | 201.95 | 30.30 |
| Johnson, Thomas | 1.90 | .29 |
| Jewell Belting Co. | 86.89 | 13.04 |
| Kavanaugh, Geo. W. (150.00 + 1,208.06) | 1,358.06 | |
| Kolb, Frank E. | 74.01 | 11.10 |
| Kottertiz, John | 10.75 | 1.61 |
| 131 Larabee, John E. | $20.59 | $3.08 |
| Lasher, J. D. | 13.82 | 2.08 |
| Leavitt, Ezra W. | 12.81 | 1.93 |
| Mayo Mills, The | 794.86 | 117.73 |
| Merrow Machine Co. | 41.01 | 6.15 |
| Mills, Albert M. | 323.45 | 48.51 |
| National Bank of Newport | 20,455.94 | 3,068.40 |
| Newport Electric Light & Power Company | 75.00 | 11.25 |
| Newport, Board of Water Com. of the village of | 33.33 | 4.99 |

| | | |
|---|---|---|
| Purdy, O. N. & Co. | 15.00 | 2.25 |
| Purdey, O. N. | 10,000.00 | 1,500.00 |
| Rome Box & Lumber Co. | 417.12 | 62.56 |
| Skenandoa Cotton Co., The | 1,519.92 | 228.00 |
| Singer Mfg. Co., The | 2.44 | .37 |
| Snell, C. R. | 1,500.00 | 225.00 |
| Sheard Titus Co. | 172.57 | 25.90 |
| Speilman, Michael | 33.45 | 5.02 |
| Thompson, John L. Sons & Co. | 142.70 | 21.41 |
| Utica Bag & Paper Co. | 10.22 | 1.53 |
| Union Special Sewing Machine Co. | 41.48 | 6.22 |
| Williams, Dr. U. G. | 75.00 | 11.25 |
| Ballston Spa, First National Bank of | 5,001.11 | 750.16 |
| Burrell, David & others (Herk. Nat. Bank) | 5,001.11 | 750.16 |
| Burrell, David & others (First Nat. Bk. of Herk.) | 5,001.11 | 750.16 |
| Burrell, David & others (Fulton Co. Nat. Bank) | 5,000.99 | 750.14 |
| | | 9,619.31 |
| Robert F. Livingston | 25.00 | 3.25 |
| | | 9,622.56 |

WM. H. COMSTOCK.
*Referee in Bankruptcy.*

| | | |
|---|---|---|
| Theodore Tiedeman & Son | $213.31 | 32.00 |

73-77 Mercer St., New York.

(Endorsed:) Copy of Dividend Warrant, Ex. 3, Oct. 25, 1907. G. W. R., U. S. J.—Filed Sep. 14, 1908.—W. S. Doolittle, Clerk.

132 Newport Knitting Company.

Dividend Sheet—5% Dividend.

| No. | Name of creditor. | Claimed allowed. | Dividend. |
|---|---|---|---|
| 1. | Acme Paper Box Co. | $1,417.63 | $70.88 |
| 2. | American Raveler Co. | 1.35 | .06 |
| 3. | Arnold Hoffman & Co. | 169.89 | 8.49 |
| 4. | Barker, C. B. & Co. | 147.58 | 7.37 |
| 5. | Cahill, Wm. E. | 506.50 | 25.32 |
| 6. | Catlin & Co. | 2,414.74 | 120.73 |
| 7. | Charles, Wm. B. | 3,088.57 | 154.42 |
| 8. | Crawford, The Mfg. Co. | 1.76 | .09 |
| 9. | Chalmers, Harvey | 228.00 | 11.40 |
| 10. | Dexter, Dr. L. C. | 50.00 | 2.50 |
| 11. | Dresser & Olmstead | 39.00 | 1.95 |

| | | | |
|---|---|---|---|
| 12. | Dynamite-Anti Clorine Co. | 21.80 | 1.09 |
| 13. | Franklin Needle Co. | 170.00 | 8.50 |
| 14. | Gray, The S. Co. | 53.76 | 2.68 |
| 15. | Hyde, A. S. & Co. | 116.89 | 5.84 |
| 16. | Herkimer Coal Co. | 108.90 | 5.45 |
| 17. | Horton, Robert E. | 28.39 | 1.41 |
| 18. | Irving & Leiper Mfg. Co., The | 201.95 | 10.10 |
| 19. | Johnson, Thomas | 1.90 | .09 |
| 20. | Jewell Belting Co. | 86.89 | 4.34 |
| 21. | Kavanaugh, Geo. W. | 1,358.06 | 67.90 |
| 22. | Kolb, Frank E. | 74.01 | 3.70 |
| 23. | Koetteritz, John | 10.75 | .53 |
| 24. | Larabee, John E. | 20.59 | 1.02 |
| 25. | Lasher, J. D. | 13.82 | .69 |
| 26. | Leavett, Ezra W. | 12.81 | .64 |
| 27. | Mayo Mills, The | 784.86 | 39.24 |
| 28. | Merrow Machine Co. | 41.01 | 2.05 |
| 29. | Mills, Albert M. | 323.45 | 16.17 |
| 30. | National Bank of Newport | 20,455.94 | 1,022.80 |
| 133 | | | |
| 31. | Newport Electric Light & Power Co. | $75.00 | $3.75 |
| 32. | Newport, Board of Water Commissioners of the Village of | 33.33 | 1.66 |
| 33. | Purdy, O. N. & Co. | 15.66 | .75 |
| 34. | Purdy, O. N. | 10,000.00 | 500.00 |
| 35. | Rome Box & Lumber Co. | 417.12 | 20.85 |
| 36. | Skenandoa Cotton Co. | 1,519.92 | 76.00 |
| 37. | Singer Mfg. Co. | 2.44 | .12 |
| 38. | Snell, C. R. | 1,500.00 | 75.00 |
| 39. | Sheard, Titus Co. | 172.57 | 8.63 |
| 40. | Speilman, Michael | 33.45 | 1.67 |
| 41. | Thompson, John L. Sons & Co. | 142.70 | 7.13 |
| 42. | Utica Bag & Paper Co. | 10.22 | .51 |
| 43. | Union Special Sewing Machine Co. | 41.48 | 2.07 |
| 44. | Williams, Dr. U. G. | 75.00 | 3.75 |
| 45. | Ballston Spa, First Nat. Bank of | 5,001.11 | 250.05 |
| 46. | Burrell, D. & others (Herk. Nat. Bank) | 5,001.11 | 250.05 |
| 47. | Burrell, D. & others (First Nat. Bank of Herkimer) | 5,001.11 | 250.05 |
| 48. | Burrell, D. & others (Fulton Co. Nat. Bank) | 5,000.99 | 250.04 |
| 49. | Livingston, Robert F. | 25.00 | 1.25 |
| 50. | Tiedman, Theo. & Son | 213.31 | 10.66 |
| | | $66,231.66 | $3,311.44 |

(Endorsed:) List of Debts Proved, &c.—Exhibit #5 of Nov. 7 07. W. E. Seavey, G. W. R., U. S. J.—Filed Sep. 13, 1908.—W. S. Doolittle, Clerk.

134 *Abstract of Proof of Debts Referring to the Foregoing Record as Agreed upon Between the Attorneys for the Respective Parties to be Used in Place of the Originals:*

1. Arnold, Hoffman & Co., incorporated under the laws of the State of Rhode Island, a claim for $169.89 for dye stuffs and chemicals sold and delivered to Newport Knitting Co. on and between June 3rd and July 30th.

2. National Bank of Newport, a corporation, incorporated under the laws of the United States of America as a National Bank, creditor for $20,455.94. Consideration of which debt was money loaned on four several promissory notes: 1st of which was for $5,000 made by H. P. Snyder Mfg. Co. as maker, dated July 14, 1903, payable to the order of the Newport Knitting Co. in four months after its date and endorsed by the Newport Knitting Co. and protested Nov. 16, 1903; 2nd note was for $5,000 made by Titus Sheard, dated Aug. 13, 1903, payable in four months after its date to the order of Newport Knitting Co., endorsed by the Newport Knitting Co., protested for non-payment Dec. 14, 1903; 3d note was for $5,000 made by Frank Senior as maker, dated June 5, 1903, and payable four months after its date, to the order of the Newport Knitting Co., endorsed by the Newport Knitting Co. and protested for non-payment Oct. 5, 1903; 4th note was for $5,000 made by the Newport Knitting Co. as maker, dated Sept. 14, 1903, and payable four months after its date to the order of the Newport Knitting Co. and endorsed by the latter and protested for non-payment Jan. 14, 1904.

3. Orville N. Purdy, of Boston, Mass., creditor for $10,000 for which the said creditor held two notes for $5,000 each, one dated July 13, 1903, payable in four months after its date and the other dated Aug. 13, 1903, also payable four months after date.

135 4. David H. Burrell, Charles A. Millar and Myron G. Bronner, creditors in the sum of $5,000.99, with interest from Nov. 24, 1903, consideration of which was a promissory note made by the Newport Knitting Co. for $5000, dated July 24, 1903, whereby they promised to pay said sum at the Fulton County National Bank at Gloversville, in four months after its date, endorsed by the Newport Knitting Co. and by Titus Sheard and for value received, before maturity, transferred and delivered to the Fulton County National Bank of Gloversville, N. Y., and at maturity duly presented for payment which was refused and thereupon protested and of which note said creditors are the owners.

5. David H. Burrell, Charles A. Millar and Myron G. Bronner, creditors in the sum of $5,001.11, with interest from Dec. 10, 1903. The consideration of which was a promissory note for $5,000, dated Aug. 10, 1903, made by the Newport Knitting Co. and payable to the order of themselves at the First National Bank of Herkimer in four months after its date, endorsed by the Newport Knitting Co. and by Titus Sheard and afterwards for value received and before maturity, transferred and delivered to the First National Bank of Herkimer, which note was at maturity presented for payment which was refused whereupon same was protested for non-payment and of which note said creditors are the owners.

6. David H. Burrell, Charles A. Millar and Myron G. Bronner, creditors in the sum of $5,001.41, with interest from Nov. 17, 1903, consideration of which was a promissory note made by the Newport Knitting Co. for $5,000, dated July 17, 1903, payable to the order of Frank Senior in four months after its date, endorsed by Frank Senior and Titus Sheard, and afterwards for value received and before maturity, transferred and delivered to the Herkimer National Bank, and at maturity presented to said bank for payment
136 which was refused and thereupon protested for non-payment and of which note said creditors are the owners.

7. William B. Charles, a creditor for $1312.86, with interest from Oct. 20, 1903, consideration of which was a promissory note made by the Newport Knitting Co., payable to the order of said creditor for goods, wares and merchandise consisting of cotton yarns sold and delivered by the creditor to the Newport Knitting Co. prior to June 20, 1903. Which note was dated June 20, 1903, and payable in four months after its date at the National Bank of Newport, no part of which has been paid.

8. George W. Kavanaugh, creditor for $1,208.06, with interest from Sept. 7, 1903, and the further sum of $1.11 protest fees and expenses on a certain note with interest from Oct. 9, 1903, the consideration of which debt was goods, wares and merchandise, sold and delivered by the said creditor to the Newport Knitting Co. upon running account, and for which a note for said sum, dated Sept. 7, 1903, payable two months after its date, was made by the Newport Knitting Co. and payable to said creditor, and which note was at maturity presented for payment, which being refused was protested for non-payment.

9. George W. Kavanaugh, creditor for $189.65, the consideration of which was the sum of $39.65, with interest on Jan., Feb., March, April and May accounts, and $150 for 300 pounds of thread at $0.50 a pound, alleged to have been sold and delivered by the said creditor to said Newport Knitting Co.

10. The Crawford Mfg. Co., creditor for the sum of $1.76, for goods, wares and merchandise, sold and delivered by said creditor to the Newport Knitting Co. on July 22, 1903.

11. Titus Sheard Co., a corporation, incorporated, a creditor for $172.57, the consideration of which was goods, wares and
137 merchandise, consisting of yarn sold and delivered by it to the said Newport Knitting Co., amounting to the sum of $929.48 less a credit by ledger account of $756.91.

12. William E. Cahill, creditor for $506.50, the consideration of which was for services rendered to the said Newport Knitting Co. as superintendent from March 1, 1903, to March 1, 1904, eighteen weeks and two days at $30 per week—$550 less $43.50 paid thereon in cash.

13. Acme Paper Box Co., consisting of Morris Marriott and Robert E. Steele, creditors for the sum of $1,417.63, the consideration of which was, first, a note for $838.44, made by the said bankrupt, dated Aug. 27, 1903, payable in two months after its date; 2nd, on account of goods, wares and merchandise sold and delivered

to said Newport Knitting Co. by said creditor on or between Aug. 4, 1903, and Sept. 29, 1903, amounting to $579.22.

14. First National Bank of Ballston Spa, creditor, a corporation incorporated under the laws of the United States as a National Bank, creditor, for the sum of $5,000, with interest thereon from Oct. 10, 1903, together with $1.11 protest fees. The consideration of which was a note dated June 10, 1903, for $5,000 payable four months after date, made by the Newport Knitting Co., endorsed by the Newport Knitting Co. and Titus Sheard, and of which said creditor was the owner.

15. Albert M. Mills, creditor for $323.45, the consideration of which was services rendered as an attorney and disbursements paid out for said Newport Knitting Co. in various litigations and legal business on and between Jan. 13, 1902, and Oct. 24, 1903, less payment on account in cash between Jan. 27, 1902, and June 8, 1903, of $270, and also services and disbursement as attorney in April, 1903, amounting to $130.75, less a payment thereon in cash on Feb. 9, 1903, of $20.

138 United States District Court, Northern District of New York.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company,

v.

THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.

Suit in equity to set aside a transfer of property by the bankrupt The Newport Knitting Company to the National Herkimer County Bank of Little Falls, N. Y., in payment of a certain note before due and at a time when the said Newport Knitting Company was insolvent and its insolvency was known to the bank and to recover this said property as an illegal preference.

Henry J. Cookinham, for Complainant.
Myron G. Bronner and Hon. A. M. Mills, for the Defendant.

RAY, *District Judge:*

The Newport Knitting Company was incorporated about September 11, 1900, under the laws of the State of New York with a capital stock of $30,000 divided into 300 shares, with its principal place of business at Newport, Herkimer Co., N. Y., to carry on a knitting mill, woolen and cotton factory and manufacture, buy and sell knit goods, cloth, yarns, wool and cotton, &c.

Its incorporators and directors were Titus Sheard, Frank Senior, H. P. Snyder, Orville P. Purdy and Edwin I. Stimson, and 100 shares were issued to Purdy, 45 shares to Sheard, 45 shares
139 to Senior, 45 shares to Snyder, 20 shares to Stimson and 20 shares to Weyman Walker. One hundred and seventy-five shares were paid for on machinery and supplies sold to it by the H. P. Snider Manufacturing Company and it seems nothing was paid for the other shares although it was asserted there was a con-

sideration. There was another corporation, known as the Titus Sheard Corporation, and it is said the Newport Company was a subsidiary of the Sheard Company as I shall designate the two. One witness who ought to know the facts so spoke of and designated it. The directors and officers of both corporations were substantially the same. Titus Sheard was the president and financial head of both. Stimson was his son-in-law and Senior his nephew. Subsequent to July, 1901, the books of account of the Newport Knitting Company were kept in the office of the Titus Sheard Company at Little Falls, and in the same room by the same person. Titus Sheard was a director of the defendant bank and had been for many years prior to the transaction complained of and was a personal friend of its president, David Burrell, and its cashier, Geo. D. Smith. In the summer of 1903, the Sheard Company was financially embarrassed and Burrell, the president of the bank and one C. A. Miller, one of its directors, undertook to assist it in liquidating its affairs. Consultations were had and these resulted in an agreement by which, Aug. 8, 1903, that company, in effect, transferred all its property and effects to the bank.

There was a series of notes among which was one of $5,773.05 discounted January 8, 1901, at defendant bank made by the Newport Knitting Company, indorsed by the Titus Sheard Company and discounted by said Sheard Company for its own benefit. Partial payments were made and renewals had until May 11, 1903, when it was renewed for four months, and on Aug. 22, 1903, and before it was due it was renewed for three months. This is the
140 note in question here the payment of which is alleged to have been made, in fact, by the Newport Knitting Company on the 26th day of September, 1903, before due and as a preference. The amount of the note was then $4,953.33 less the accrued interest. It was paid by the check of the Titus Sheard Company from funds in the bank to its credit, but such payment, or the amount of the note, was at once charged to the account of the Newport Knitting Company which then had goods or credit for goods with the Titus Sheard Company, in excess of the amount of the note. The effect of this transaction was to lessen the assets of the Newport Knitting Company by the amount of the note $4,953.33 in payment of its own note and transfer that amount of its assets to the Titus Sheard Company in payment to it of the $4,953.33 which it paid the bank, and to the bank which by virtue of the transfer before mentioned had become or became possessed of all the assets and property of the Titus Sheard Company. The Newport Knitting Company and its creditors did not get the said $4,953.33. The defendant bank got the whole of it. Such was the well known and legal and intended effect. Both the Titus Sheard Company and The Newport Knitting Company were then insolvent, and this fact was well known to the bank and its officers. The operations of the Knitting Company were then practically suspended and were never resumed, and the Titus Sheard Company was being practically wound up by the bank which knew the relations of the two companies.

About the middle of October, 1903, proceedings for the voluntary dissolution of the bankrupt, Newport Knitting Company, were instituted December 30, 1903, a petition in bankruptcy was filed against the Newport Knitting Company and an adjudication was had Jan. 23, 1904. There can be no doubt that the Newport Knitting Company knew of, assented to and took part in the payment of the note in the manner aforesaid.

141 There can be no question that it and the Titus Sheard Company, knowing their financial condition and insolvency, intended a preference to the bank and that the bank was seeking and intended to obtain and receive a preference over the other creditors of the Newport Knitting Company.

The position of the defendant bank is that the Titus Sheard Company, liable on this note to the bank as indorser, had the right under its agreement, referred to, to pay it and paid it from its own property; that the Newport Knitting Company, as maker, was liable to it and it had the right to make the set off and charge the amount to the maker; that the bank received nothing from the Newport Knitting Company and is not liable to its trustee; that even if the Titus Sheard Company, being insolvent, made a preferential payment to the bank this action does not concern that, and even if the Newport Knitting Company made a preferential payment to the Titus Sheard Company the action must be against it and cannot be maintained against the bank. The Titus Sheard Company disappeared. But as I look at this case under the evidence the payment was in fact made by the Newport Knitting Company. It knew of it and intended it in the mode described. Its property, in legal effect, was used to make the payment. The effect in equity is not changed for the reason it was done in the manner described. If the Titus Sheard Company had given its check to the Newport Knitting Company, that is, if Sheard, president, and the treasurer had given a check signed by themselves as such, representing the Sheard Company, to themselves as representing the Newport Knitting Company in payment on account and the Knitting Company had turned that over to the bank no question could be raised. A short cut was taken by common consent and the check was passed to the bank and the amount charged to the Knitting Company so that it in fact paid the note.

142 The Circuit Court of Appeals may hold that such a transaction legally evades the provisions of the Bankruptcy Act, but I cannot.

It was a preference pure and simple intended as such by all the parties to the transaction.

It was voidable, not void. This action is to declare it void and I so hold. The transaction is declared void and the trustee is entitled to recover the amount paid on the note.

(Endorsed:) Opinion.—Geo. W. Ray, U. S. Judge.—Filed Sept. 14, 1908.—W. S. Doolittle, Clerk.

United States District Court, Northern District of New York.

In Equity.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company, Complainant-Respondent,
vs.
THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS, Defendant-Appellant.

The above-named defendant, National Herkimer County Bank of Little Falls, conceiving itself aggrieved by the decree dated the 26th day of September, 1908, and entered on September 28th, 1908, in the above-entitled action, doth hereby appeal from said decree to the United States Circuit Court of Appeals in and for the Second Circuit, and it prays that this its appeal may be allowed, and
143 that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals in and for the Second Circuit.

MYRON G. BRONNER,
*Attorney for Defendant & Appellant.*

Office and Post Office Address, 5 & 7 Journal & Courier Bldg., Little Falls, N. Y.

Dated Little Falls, N. Y., December 14, 1908.

And now, to wit: On December 19, 1908, it is ordered that the appeal be allowed as prayed for.

GEO. W. RAY,
*United States District Judge.*

(Endorsed:) Petition for appeal.—Filed Dec. 21, 1908.—W. S. Doolittle, Clerk.

United States District Court, Northern District of New York.

In Equity.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company, Complainant-Respondent,
vs.
THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS, Defendant-Appellant.

Know all men by these presents that we, National Herkimer County Bank of Little Falls, a corporation having its office and principal place of business at the City of Little Falls, Herki-
144 mer County, New York, principal, and David H. Burrel, manufacturer; Redney S. Whitman, manufacturer, and J.

Judson Gilbert, manufacturer, sureties, all of the City of Little Falls, Herkimer County, New York, are held and firmly bound unto the above-named Charles B. Mason, as trustee in bankruptcy of Newport Knitting Company, bankrupt, in the sum of thirteen thousand five hundred dollars, to be paid to the said Charles B. Mason, as trustee in bankruptcy of Newport Knitting Company, bankrupt, for the payment of which, well and truly to be made, we bond ourselves, and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 18th day of December, in the year of our Lord one thousand nine hundred and eight.

Whereas, the above-named National Herkimer County Bank of Little Falls has prosecuted an appeal to the United States Circuit Court of Appeals in and for the Second Circuit, to reverse the decree rendered in the above-entitled suit by the Judge of the District Court of the United States in and for the Northern District of New York.

Now, therefore, the condition of this obligation is such that, if the above-named National Herkimer County Bank of Little Falls shall prosecute said appeal to effect and answer all damages and costs, if it fail to make said appeal good, including the amount awarded by the decree so appealed from, with all just damages for delay and cost and interest on the appeal, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

[L. S.] NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.
By D. H. BURRELL, *President.*
D. H. BURRELL. [L. S.]
RODNEY S. WHITMAN. [L. S.]
J. J. GILBERT. [L. S.]

115 STATE OF NEW YORK,
*Northern District of New York,*
*County of Herkimer,* ss:

On the 18th day of December, 1908, before me personally came David H. Burrell to me known, who being by me duly sworn, did depose and say: That he resided in the City of Little Falls, New York; that he is the president of the National Herkimer County Bank of Little Falls, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

GEO. W. BELLINGER,
*Notary Public.*

STATE OF NEW YORK,
*Northern District of New York,*
*County of Herkimer,* ss:

David H. Burrell, Rodney S. Whitman and J. Judson Gilbert, being each duly and severally sworn, each for himself, says: That he resides in the City of Little Falls, Herkimer County, New York, in

said district; that he is one of the sureties named in and who executed the foregoing instrument; that he is worth at least the sum of thirteen thousand five hundred dollars in real and personal property over and above all debts and liabilities and exclusive of property exempt from levy and sale by virtue of an execution; that the real estate owned by him as aforesaid is located within the City of Little Falls and consists of property used for manufacturing or other business purposes, and that the same stands in his own name and is unincumbered and worth at least thirteen thousand five hundred dollars, and that in addition thereto he is the owner of personal property, consisting of stocks, bonds or mortgages and other securi-
146 ties, to the amount of at least thirteen thousand five hundred dollars.

D. H. BURRELL.
RODNEY S. WHITMAN.
J. J. GILBERT.

Severally subscribed and sworn to before me this 18th day of December, 1908.

[L. S.] GEO. W. BELLINGER,
*Notary Public.*

STATE OF NEW YORK,
*Northern District of New York,*
*County of Herkimer, ss:*

On this 18th day of December, 1908, before me personally came David H. Burrell, Rodney S. Whitman and J. Judson Gilbert, to me known to be the same person named in and who executed the foregoing instrument and duly and severally acknowledged to me that they executed the same.

GEO. W. BELLINGER,
*Notary Public.*

Approved: Dec. 19, 1908.

GEO. W. RAY,
*United States District Judge.*

(Endorsed:) Supersedeas Bond. Filed Dec. 21, 1908. W. S. Doolittle, Clerk.

147 United States District Court, Northern District of New York.

In Equity.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company, Complainant-Respondent,

vs.

THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS, Defendant-Appellant.

*Assignment of Errors.*

And now comes the defendant herein by its solicitor, Myron G. Bronner, and in connection with its appeal from the decree herein

setting aside and decreeing null and void a certain alleged payment by the Newport Knitting Company to the defendant made through the Titus Sheard Company of the sum of $4,953.43, and for other relief as in said judgment stated, makes and files the following assignments of error:

1. The court erred in holding that the payment to the defendant bank on the 26th day of September, 1903, of the sum of $4,953.43 was a preferential payment.

2. The court erred in holding and deciding that the payment of said sum of $4,953.43, made to the defendant bank on the 26th day of September, 1903, was made by the Newport Knitting Company, while the learned court should have found and decided that
148 said payment was in fact made by the Titus Sheard Company.

3. The court erred in holding and deciding that the Newport Knitting Company was insolvent at the time of said payment to the defendant of said sum of $4,953.43 on the 26th day of September, 1903.

4. The court erred in holding and deciding that the defendant bank knew or had reasonable cause to believe that the payment made to it on September 26th, 1903, of the sum of $4,953.43 was intended as a preferential payment, and was voidable by the plaintiff as trustee in bankruptcy of said Newport Knitting Company.

5. The court erred in setting aside and declaring null and void the payment made to the defendant bank, by the Newport Knitting Company, through the Titus Sheard Company of the sum of $4,953.43 on September 26th, 1903.

6. The court erred in ordering and directing that the complainant recover*ed* of the defendant said sum of $4,953.43 with interest on the same from September 26th, 1903, amounting in all to $6,439.03 with costs.

7. The court erred in stating or intimating in this opinion that 175 shares of the capital stock of the Newport Knitting Company was paid for by machinery and supplies sold to it by the H. P. Snyder Manufacturing Company and that nothing was paid for the other 125 shares of the company's stock.

8. The court erred in stating or intimating in its opinion that the Newport Knitting Company was a subsidiary company of the Titus Sheard Company.

9. The court erred in stating or intimating in its opinion that subsequently to July, 1901, the books of account of the New-
149 port Knitting Company were kept in the office of the Titus Sheard Company and in the same room by the same person.

10. The court erred in stating or intimating in its opinion that the interpretation and effect of the agreement of August 8th, 1903, given by the Titus Sheard Company to the defendant was to transfer all of the property and effects of the power to the latter, including the property and effects of the Newport Knitting Company or any part thereof.

11. The court erred in stating its opinion that the effect of the transaction wherein the Titus Sheard Company paid to the defendant

the sum of $4,953.43 on September 26th, 1903, was to transfer said sum to the defendant and to lessen the assets of the Newport Knitting Company by such sum.

12. The court erred in stating in its opinion that the Newport Knitting Company did not get the benefit of said sum of $4,953.43, but that the defendant got the whole of it, and that such was the well known and legal and intended effect of the transaction.

13. The court erred in stating in its opinion that the defendant bank and its officers well knew that both the Titus Sheard Company and the Newport Knitting Company were insolvent at the time of the aforesaid payment.

14. The court erred in stating in its opinion that the affairs of the Titus Sheard Company were or had been practically wound up by the defendant bank prior or at the time of the aforesaid payment, and that the defendant knew of the relations then and previously existing between the Titus Sheard Company and the Newport Knitting Company.

15. The court erred in stating in its opinion that there could be no doubt that the Newport Knitting Company knew of and
150 assented to and took part in payment to the defendant of said sum of $4,953.43 on the note in question, and that the Titus-Sheard Company knowing the Newport Knitting Company's financial condition and insolvency, intended a preference to the defendant bank, and that the latter was seeking and intending to obtain and secure a preference over the other creditors of the Newport Knitting Company.

16. The court erred in refusing to dismiss the complaint for want of equity jurisdiction and because the complaint had a plain, complete and adequate remedy at law.

17. The court erred in not finding and holding that the defendant did not know and had no reason or grounds to believe that the Newport Knitting Company was insolvent on September 26th, 1903, when said sum of $4,953.43 was paid to the defendant bank.

18. That the court erred in failing and refusing to hold and find that the defendant bank did not know and had no reasonable cause to believe that an alleged preference was intended by the payment to it on September 26th, 1903, of said sum of $4,953.43 in the manner shown by the evidence herein.

By reason of the aforesaid errors the defendant prays that said decree of said District Court may be reversed, and that the said District Court may be ordered to enter a decree in said suit, dismissing the bill of complaint at the cost of complainant.

MYRON G. BRONNER,
*Solicitor for Defendant.*

(Endorsed:) Assignment of Errors.—Filed Dec. 21, 1908.—W. S. Doolittle, Clerk.

151 UNITED STATES OF AMERICA, *ss:*

To Charles B. Mason, as Trustee in Bankruptcy of the Newport Knitting Company, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals in and for the Second Circuit, to be holden at the City of New York, on the 18th day of January, 1909, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States in and for the Northern District of New York, wherein the National Herkimer County Bank of Little Falls is appellant, and Charles B. Mason, as trustee in bankruptcy of Newport Knitting Company, a bankrupt, is respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of December, in the year of our Lord one thousand nine hundred and eight.

GEO. W. RAY,
*United States District Judge.*

(Endorsed:) U. S. District Court, Northern District of New York.—Chas. B. Mason, as trustee in Bankruptcy of Newport Knitting Company vs. National Herkimer County Bank of Little Falls.—Original Citation of Appeal.—Myron G. Bronner, Attorney for Defendant. Office and P. O. Address, 5 and 7 Journal and Courier Building, Little Falls, N. Y.—Due and personal service of a copy of the within Citation admitted this 20 day of January, 1909.—Cookinham & Cookinham, Attorneys for Pl'ff.—U. S. District Court, N. D. of N. Y.—Filed Dec. 21, 1908, at — o'clock M.—W. S. Doolittle, Clerk.

152 United States District Court, Northern District of New York

CHARLES B. MASON, as Trustee in Bankruptcy of Newport Knitting Company,
vs.
NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.

It is hereby stipulated that the foregoing pages, numbered from one to one hundred fifty-two, inclusive, shall constitute the transcript of record on appeal in the above-entitled cause, and that the record as so stipulated may be certified by the Clerk of said court to the United States Circuit Court of Appeals for the Second Circuit.

COOKINHAM & COOKINHAM,
*Solicitors for Complainant.*
MYRON G. BRONNER,
*Solicitor for Defendant.*

153 UNITED STATES OF AMERICA,
*Northern District of New York,*
*District Court Clerk's Office, ss:*

I, William S. Doolittle, Clerk of the District Court of the United States for the Northern District of New York, do hereby certify that the foregoing pages, numbered from one to one hundred and fifty-two, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Charles B. Mason, as Trustee in Bankruptcy of the Newport Knitting Company vs. National Herkimer County Bank of Little Falls, as the same remain on file in my said office, and have been stipulated by the solicitors for the respective parties.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at the City of Utica, in said District, this 29th day of January, A. D. 1909.

[SEAL.] W. S. DOOLITTLE, *Clerk.*

154 United States Circuit Court of Appeals for the Second Circuit,
October Term, 1909.

No. 279.

Argued May 18, 1909.
Decided July 21, 1909.

CHARLES B. MASON, as Trustee, etc., Complainant-Appellee,
vs.
THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of New York.

Before Lacombe, Coxe and Noyes, Circuit Judges.

Appeal from the District Court, Northern District of New York.

The complainant is the trustee in bankruptcy of the Newport Knitting Company, a corporation under the laws of the State of New York, and lately engaged in the business of manufacturing knit goods at Newport, Herkimer County, New York.

The defendant is a national bank, located and doing business at Little Falls in said county, and some twenty-two miles from Newport.

The Titus Sheard Company is a New York corporation which, like the Newport Company, was engaged in the business of manufacturing knit goods, and was located at said Little Falls.

155 The Sheard Company and the Newport Company, while maintaining distinct and separate corporate organizations, were closely associated in business, and had to some extent the same stockholders and officers. Neither corporation, however,

owned any shares in the other, and it does not appear that the same persons owned controlling interests in both corporations.

The Sheard Company was a customer of the defendant bank; kept its deposit account with it, and discounted its own paper and that received from persons dealing with it. The Newport Company was never a customer of the defendant bank.

On January 7, 1901, the Newport Company gave the Sheard Company its four months' note for $5,773.05 in payment for certain machinery and merchandise purchased. The Sheard Company endorsed this note and discounted it for its own benefit at the defendant bank. The note was reduced by partial payments to $5,000 and was renewed with the same endorsement from time to time until May 11, 1903, when it was again renewed for four months so as to mature September 11, 1903. On August 22, 1903, however, and before the maturity of said note, it was taken up through the action of the Sheard Company by a new three months' note likewise endorsed by said Sheard Company and secured by collateral deposited by said Company. The collateral consisted of accounts receivable amounting to $6,300 belonging to the Sheard Company and in which the Newport Company—the maker of the note—had no interest. On September 26, 1903, and before the maturity of the last mentioned note the Sheard Company paid $4,953.33 to the defendant bank, being the amount of said note—$5,000—less unearned interest, took up the said note, and received back its collateral. The Sheard Company made this payment upon its own initiative and in its own behalf by cheque drawn upon funds belonging wholly to it.

At the time when the Sheard Company paid and took up said note and collateral it was indebted to the Newport Company upon open account in a sum in excess of the amount of said note. Upon taking up said note it credited the amount paid—$4,953.33—to itself upon its account with the Newport Company. This was done with the knowledge and approval of the Newport Company but not—so far as appears upon the record—with the knowledge of the defendant.

In August, 1903, when the Sheard Company substituted the three months' collateral note in place of the existing four months'
156 note which was merely endorsed, it was otherwise largely indebted to the defendant bank upon its own and endorsed paper and at that time made an agreement with the defendant whereby it practically pledged all its property as security for such indebtedness.

On January 23, 1904, and within four months after the taking up of the last note by the Sheard Company as aforesaid, the Newport Company was adjudged a bankrupt.

The District Court, in accordance with the claims of complainant, held that the last mentioned transaction amounted to a preference under section 60 of the bankruptcy act which, so far as is relevant here, reads as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the peti-

tion, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of another person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

NOYES, *Circuit Judge* (after making the foregoing statement):

The one thing absolutely essential to a preference is that the bankrupt transfer some portion of his property to the creditor. If the creditor receive none of the bankrupt's property there is no preference. And that is the primary difficulty with the complainant's case. The defendant bank received no property or money of the Newport Company. The Sheard Company as endorser of the note took up and paid its own funds therefor—funds in which the Newport Company had no interest whatever.

It is true that the Sheard Company at the time it paid the note was indebted to the Newport Company, but that in no sense made its funds the property of the latter. An unsecured creditor has no interest in his debtor's property until he has sequestered it. The money which the defendant received belonged to the Sheard Company and not to the bankrupt.

It follows, then, that there was no preference unless that which was actually done can be treated as the equivalent for some-
157 thing else. And that is the theory of the District Court's decision. It is pointed out that if the Newport Company had collected its claim from the Sheard Company and had itself paid the note there would have been a transfer from the Newport Company to the bank. And it is said that it was merely a short cut for the Sheard Company to pay the note and charge the amount paid upon its account against the Newport Company—that the effect of the two transactions was the same. There would be much force in this argument if the Sheard Company stood in the transaction merely as a debtor of the Newport Company. It may well be that when a debtor with the approval of his creditor takes up the latter's note at a bank and offsets the amount paid upon his debt the payment to the bank will be treated as having been made by the creditor—the debtor being really his agent in the transaction. But that was not the situation here. The Sheard Company was the endorser of the note and had pledged its own property as security therefor. In taking up the note and collateral it acted in its own behalf and in no sense as the agent of the Newport Company. The note was not discharged. The Sheard Company as against the Newport Company became the holder instead of the bank. Upon no permissible theory of law or equity can it be said that the note was paid by the Newport Company.

But it is further urged that the effect of the transaction was to appropriate certain assets of the Newport Company, to wit: its demand against the Sheard Company, to the payment of this note to the exclusion of other creditors. As already pointed out, however, this ultimate result would not make the transaction a preference—

the Sheard Company alone dealing with the bank and acting in its own interest. But it cannot be conceded that the result claimed would follow. If the Sheard Company, knowing the Newport Company to be insolvent, acquired the note with a view to using it as a set off or counterclaim against its debt, it could not legally do so (Bankruptcy Law, sec. 68*b*). And if the Sheard Company could not offset the note against the account of the Newport Company there was no transfer or appropriation of such account, and much less a preference. The debt could still be collected by the trustee of the Newport Company and used for the benefit of all the creditors.

Finally, it is contended in substance that equity requires
158 that the decree be permitted to stand—that the whole transaction was an evasion of the bankruptcy act. We see no basis for this contention. The note which was paid was apparently well secured by the endorser's collateral. There was no reason why it should not have been paid in full. The bank received no more than it was entitled to without looking to the bankrupt's property at all. It cannot be said that equity requires us to affirm a decree compelling a bank to pay back to the trustee of the maker of a note money received from an endorser, and upon the payment of which it surrendered collateral deposited by such endorser.

The decree of the District Court is reversed with costs and the cause is remanded with instructions to dismiss the bill with costs.

159 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 31st Day of July, One Thousand Nine Hundred and Nine.

Present:

Hon. E. Henry Lacombe,
Hon. Alfred C. Coxe,
Hon. Walter C. Noyes,
Circuit Judges.

CHARLES B. MASON, as Trustee, etc., Complainant-Appellee,
vs.
THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is reversed with costs and cause remanded with instructions to dismiss the bill with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

W. C. N.

160 Endorsed: United States Circuit Court of Appeals, Second Circuit. C. B. Mason vs. Nat. Herkimer Bank. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 6, 1909. William Parkin, Clerk.

161 United States Circuit Court of Appeals in and for the Second Circuit.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company,

vs.

THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.

The claim of the complainant in the above entitled suit having been duly assigned by me to the National Bank of Newport, N. Y. I hereby consent that said National Bank of Newport be substituted as party complainant in the place and stead of Charles B. Mason as trustee of Newport Knitting Company, bankrupt, in this suit, and that said suit be continued without prejudice to the proceedings already had. An order to the above effect may be entered on filing this stipulation without further notice.

Dated October 4th, 1909.

CHAS. B. MASON,
*As Trustee in Bankruptcy of*
*Newport Knitting Company, Bankrupt.*

I consent that the foregoing order be made, upon the condition that said National Bank of Newport assumes and agrees to pay the present judgment herein in favor of the defendant against Charles B. Mason, as Trustee, complainant, unless the same is reversed on appeal, such order and substitution to be without prejudice to all proceedings already had.

Dated, November 6, 1909.

MYRON G. BRONNER,
*Solicitor for the Defendant.*

Conditions accepted by National Bank of Newport.
COOKINHAM & COOKINHAM,
*Solicitors for National Bank of Newport.*

162 (Endorsed:) U. S. Circuit Court of Appeals, Second Circuit. Charles B. Mason, as Trustee in Bankruptcy of the Newport Knitting Company, vs. The National Herkimer County Bank of Little Falls. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 9, 1909. William Parkin, Clerk.

163 United States Circuit Court of Appeals in and for the Second Circuit.

CHARLES B. MASON, as Trustee in Bankruptcy of the Newport Knitting Company,

vs.

THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.

The above entitled complainant having sold and assigned the claim and cause of action in this suit to the National Bank of Newport, New York, and having signed a stipulation consenting that said National Bank of Newport, New York, be substituted as party complainant in the place and stead of Charles B. Mason as trustee of said bankrupt, and that said suit be continued without prejudice to the proceedings already had; and, said defendant having assented to such substitution on the condition that said National Bank of Newport assume and agree to pay the present judgment herein in favor of the defendant and against Charles B. Mason as trustee unless the same is reversed on appeal, such order to be without prejudice to all proceedings already had, and said National Bank of Newport accepting said conditions:

Now on reading and filing said stipulation and on motion of Cookinham & Cookinham, solicitors for the said complainant and the National Bank of Newport:

It is ordered that the said National Bank of Newport, New York, be and the same is hereby substituted as complainant in the
164 above entitled action in place of said Charles B. Mason as Trustee in Bankruptcy of the Newport Knitting Company, bankrupt, and that said suit be continued in the name of said National Bank of Newport, New York, without prejudice to the proceedings already had.

E. H. L.
A. C. C.

165 (Endorsed:) U. S. Circuit Court of Appeals, Second Circuit. Charles B. Mason, as Trustee in Bankruptcy of the Newport Knitting Company, vs. The National Herkimer County Bank of Little Falls. Order Substituting National Bank of Newport, Complainant, &c. Cookinham & Cookinham, Solicitors for Complainant, Mann Building, Utica, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 9, 1909. William Parkin, Clerk.

166 Supreme Court of the United States.

NATIONAL BANK OF NEWPORT, NEW YORK, Appellant,
against
NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS, NEW YORK, Appellee.

The above-named appellant National Bank of Newport, New York, respectfully shows that the amount in controversy herein exceed the sum of five thousand dollars besides costs and the questions involved are those upon which the decision of the United States Circuit Court of Appeals is not final and said National Bank of Newport, New York, conceiving itself aggrieved by the order of the United States Circuit Court of Appeals for the Second Circuit, granted on the 31st day of July, 1909, and entered in the Clerk's Office of said court on the 6th day of August, 1909, in the above entitled suit does hereby appeal from said order to the Supreme Court of the United States, and it prays that its appeal may be allowed and that a transcript of the record and proceedings and papers upon which said order was made duly authenticated may be sent to the Supreme Court of the United States, sitting at Washington, D. C.

COOKINHAM & COOKINHAM,
*Solicitors for Appellant,*
*Mann Building, Utica, N. Y.*

And now to wit, on this 22d day of November, 1909.

It is ordered that the appeal mentioned in the above notice be and the same is hereby allowed as prayed for.

ALFRED C. COXE,
*U. S. Cir. Judge.*

167 (Endorsed:) Supreme Court of the United States. National Bank of Newport, New York, Appellant, against National Herkimer County Bank of Little Falls, New York, Appellee. Notice and allowance on appeal. Cookinham & Cookinham, Solicitors for Appellant, Mann Building, Utica, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 23, 1909. William Parkin, Clerk.

168 Supreme Court of the United States.

NATIONAL BANK OF NEWPORT, NEW YORK, Appellant,
against
NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS, NEW YORK, Appellee.

The above-named appellant hereby assigns error to the decision of the Circuit Court of Appeals of the United States, Second Circuit, and to the decree entered thereon in the Clerk's Office of the District Court for the Northern District of New York, in the above entitled action in the following respects:

First. That the Circuit Court of Appeals erred in holding that the decree of the District Court in favor of complainant and against the defendant for $6,633.21 should not be affirmed, and in not holding that said decree should be affirmed.

Second. The court erred in holding that the payment of the sum of $4,953.43 to defendant on the 26th day of September, 1909, was not a transfer of the property of the bankrupt, namely, the Newport Knitting Company, by which the defendant knowingly and intentionally procured a preferential payment over the other creditors of the said bankrupt, and in not holding that such payment was a preferential payment by the said bankrupt to the defendant, and that complainant was entitled to have such transfer set aside and to recover said amount from the defendant.

169 Third. The court erred in holding that the giving of the check, by the Titus Sheard Company, for $4,953.33 to the defendant, on September 26th, 1903, and, immediately, charging the same against the indebtedness of said Sheard Company to the Newport Knitting Company, with the knowledge and consent of said company and of the defendant, and with an intent, on the part of all said parties, to give said defendant a preference over the other creditors of the bankrupt, was not a transfer of property of the Newport Knitting Company, for the benefit of the defendant, and that such transfer was against the provisions of the Bankrupt law, and in not holding that the same was a preferential transfer of property of the Newport Knitting Company, for the benefit of the defendant, and that the same or its value should be recovered of defendant by the trustee in bankruptcy of said bankrupt.

Fourth. The court erred in holding that the defendant was entitled to have the bill of complaint dismissed, and that defendant was entitled to recover its costs in the Circuit Court of Appeals and also in the District Court, and in not holding that the complainant was entitled to have said decree of the District Court affirmed with his costs in the Circuit Court of Appeals and also in the District Court.

Dated October 30, 1909.

COOKINHAM & COOKINHAM,
*Solicitors for Appellant,*
*Mann Building, Utica, N. Y.*

Presented on application for appeal Nov. 22, 1909.
ALFRED C. COXE,
*U. S. Cir. Judge.*

170 (Endorsed:) Supreme Court of the United States. National Bank of Newport, New York, Appellant, against National Herkimer County Bank of Little Falls, New York, Appellee. Assignments of error. Cookinham & Cookinham, Solicitors for Appellant, Mann Building, Utica, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 23, 1909. William Parkin, Clerk.

171 Supreme Court of the United States.

NATIONAL BANK OF NEWPORT, NEW YORK, Appellant,
against
NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS, NEW YORK,
Appellee.

Know all men by these presents: That we, National Bank of Newport, New York, a corporation, having its office and principal place of business at Newport, Herkimer County, New York, principals, and Joseph T. Wooster, banker and Fred M. Howe, retired, sureties, all of Herkimer County, New York, are held and firmly bound unto the above-named National Herkimer County Bank of Little Falls, New York, in the sum of one thousand dollars ($1,000) to be paid to the said National Herkimer County Bank of Little Falls, New York, for the amount of which well and truly to be made, we bind ourselves and each of us our and each of our heirs, executors, administrators and successors, jointly and severally firmly by these presents.

Sealed with our seals and dated this 11th day of November, in the year 1909.

Whereas, the above-named National Bank of Newport, New York, is prosecuting an appeal to the Supreme Court of the United States, reversing the order rendered in the above entitled suit by the judges of the United States Circuit Court of Appeals, in and for the Second Circuit:

Now, therefore, the condition of this obligation is such that if the above-named National Bank of Newport, New York, shall
172 prosecute said appeal to affect and answer all damages and costs if it fail to make said appeal good, with all just damages for delay and costs on appeal then this obligation shall be void otherwise the same shall be and remain in full force and virtue.

[SEAL.] THE NAT'L BANK OF NEWPORT, N. Y.,
By J. T. WOOSTER, *Pres.* [L. S.]
JOSEPH T. WOOSTER. [L. S.]
FRED M. HOWE. [L. S.]

STATE OF NEW YORK,
*County of Herkimer, ss:*

On this 11th day of November, 1909, before me personally came Joseph T. Wooster to me known who being by me duly sworn did depose and say that he resided in the village of Middleville, Herkimer County, New York; that he is president of the National Bank of Newport, N. Y., the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that

it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

DANIEL P. WOOSTER,
*Notary Public, Herkimer County, N. Y.*

173 STATE OF NEW YORK,
*Herkimer County, ss:*

On this 11th day of Nov., 1909, before me personally appeared Joseph T. Wooster and Fred M. Howe to me known to be the same persons named in and who executed the foregoing instrument and duly and severally acknowledged to me that they executed the same.

DANIEL P. WOOSTER,
*Notary Public, Herkimer County, N. Y.*

STATE OF NEW YORK,
*Herkimer County, ss:*

Joseph T. Wooster and Fred M. Howe, being duly sworn each for himself says that he resides in the County of Herkimer, New York; that he is one of the sureties named in and who executed the foregoing instrument; that he is worth at least the sum of $2,000 in real and personal property over and above all debts and liabilities and exclusive of property exempt from levy and sale by virtue of an execution; that the real estate owned by him aforesaid is located in the County of Herkimer; that it consists of lands and residence property and the same stands in his own name and is unincumbered and is worth more than the amount of said bond; that in addition thereto he is the owner of stock and mortgages and other personal securities to a like amount.

JOSEPH T. WOOSTER.
FRED M. HOWE.

Severally sworn to before me this 11th day of November, 1909.
[SEAL.]
DANIEL P. WOOSTER,
*Notary Public, Herkimer Co., N. Y.*

STATE OF NEW YORK,
*Herkimer County Clerk's Office, ss:*

I, Gersham Smith, Clerk of said County, and of the Supreme and County Courts therein, the same being courts of record, do hereby certify that Daniel P. Wooster, whose name is subscribed to the certificate to the proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment, a notary public for said county, dwelling in said county, and sworn and duly authorized to take the same, and further that I am well acquainted with his handwriting and verily believe that the signature to the certificate of said proof of acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said County and Courts at Herkimer, this 13th day of November, 1909.

GERSHAM SMITH, *Clerk.*

174 (Endorsed:) Supreme Court of the United States. National Bank of Newport, New York, Appellant, against National Herkimer County Bank of Little Falls, New York, Appellee. Bond on appeal. Cookinham & Cookinham, Solicitors for Appellant, Mann Building, Utica, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 23, 1909. William Parkin, Clerk.

The within bond is hereby approved as to its form and as to the sufficiency of the sureties.

ALFRED C. COXE,
*U. S. Cir. Judge.*

175 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 174 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of National Bank of Newport, New York, Complainant-Appellant, against National Herkimer County Bank of Little Falls, New York, Defendant-Appellee, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of November in the year of our Lord One Thousand Nine Hundred and Nine and of the Independence of the said United States the One Hundred and thirty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

176 UNITED STATES OF AMERICA, *ss:*

To National Herkimer County Bank of Little Falls, New York:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 10th day of October, Nineteen hundred and ten pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein National Bank of Newport, New York, is Appellant, and National Herkimer County Bank of Little Falls, New York, is Respondent, to show cause if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness Honorable Melville W. Fuller, Chief Justice of the United States this 26th day of November, Nineteen hundred and nine.

ALFRED C. COXE,
*United States Circuit Judge.*

Service of the above citation is hereby admitted this 27th day of November, 1909.

MYRON G. BRONNER,
*Att'y for National Herkimer County Bank, Respondent.*

177 [Endorsed:] 3507. Supreme Court of the United States. National Bank of Newport, New York, Appellant, against National Herkimer County Bank of Little Falls, New York, Respondent. Original Citation. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 30, 1909. William Parkin, Clerk.

Endorsed on cover: File No. 21,930. U. S. Circuit Court Appeals, 2d Circuit. Term No. 172. National Bank of Newport, New York, appellant, vs. National Herkimer County Bank of Little Falls, New York. Filed December 15th, 1909. File No. 21,930.

# Supreme Court of the United States

OCTOBER TERM 1911

No. 172

NATIONAL BANK OF NEWPORT, NEW YORK, Appellant,

*vs.*

NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS, Appellee.

# BRIEF FOR APPELLANT.

COOKINHAM & COOKINHAM,
*Solicitors for Appellant,*
81 Genesee Street, Utica, N. Y.

HENRY J. COOKINHAM,
*of Counsel,*
Utica, N. Y.

PRESS OF L. C. CHILDS & SON, UTICA, N. Y.

# Supreme Court of the United States

OCTOBER TERM, 1911.

No. 172.

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NATIONAL BANK OF NEWPORT, NEW YORK,
*Appellant.*

*vs.*

THE NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS, NEW YORK,
*Appellee.*

This is an appeal, by the National Bank of Newport, New York, from an order of the Circuit Court of Appeals, Second Circuit, granted on the 31st day of July, 1909, and entered in the office of the Clerk of said court August 6th, 1909, reversing a decree entered in the office of the Clerk of the District Court of the United States, Northern District of New York, on the 28th day of September, 1908, declaring void the payment of $4,953.43 by the Newport Knitting Company, a bankrupt, to the defendant-appellee on the 26th day of September, 1903, and decreeing that the complainant-appellant recover, from the defendant-appellee, the said amount with interest from the date of payment amounting to $1,486.03, making a total of $6,439.46, with $193.75 costs.

The suit was brought by Charles B. Mason, Trustee in Bankruptcy of the Newport Knitting Company, and after the decision of the Circuit Court of Appeals the cause of action was assigned to the appellant and the appellant was substituted in the place of Mason, Trustee. The appellant is a creditor of the bankrupt to the amount of about $20,000. The assignments of error appear on page 112, the substance of which is that the Circuit Court of Appeals erred in holding, as a conclusion of law, that the payment by the bankrupt to the defendant was not preferential.

## FACTS.

In order to present the case clearly it is necessary to enter into some detail in regard to the history of the bankrupt and the transactions of which appellant complains. It is also well to state here

that there are no contradicted facts as the defendant gave no evidence. All witnesses except one on a minor point were unfriendly to the complainant and friendly to the defendant.

In May, 1900, it was proposed, by certain citizens of Newport, Herkimer County, N. Y., to donate to a corporation to be formed, a lot and to build upon it a building suitable for a knitting mill. This agreement was made on the part of the citizens by Willard A. Ingham and others, as a committee, and the proposed corporation was, at that time, represented by Titus Sheard of Little Falls, N. Y. These towns being about 20 miles apart. Plans of the building were prepared and the citizens of Newport raised the money by subscription, bought the lot and erected the building according to the plans proposed, and afterward deeded the property, as a gift, to the Newport Knitting Company. This company had been incorporated, under the laws of the State of New York, before the completion of the building. The mill was to have, at least, 25 knitting machines, and was to be run for five years, at least 300 days per year.

See "Ex. 1," page 80 of Record.
"Ex. 6," Nov. 13, 1907, page 82 of Record.

The subscribers to the fund appointed a committee consisting of Daniel P. Wooster, Willard Ingham, H. W. Dexter, Benton K. Brown, L. B. Tuttle, M. M. Pearce, W. D. Grant, J. B. Lankton, David B. Ackley, Dexter Smith and Charles L. Fellows to carry out the transaction.

Evidence of Daniel P. Wooster, page 68.

This committee procured subscriptions, collected the money to pay for the lot and erected the building, which cost, in round numbers, $8,577. The owners of the real estate, at the request of the committee, deeded the property directly to the Newport Knitting Company.

Evidence of Daniel P. Wooster, page 66 to 70.
Exs., page 82, 83, 84.

The mill having been completed and deeded to the company without any consideration, was equipped, by the corporation, and commenced business as a knitting mill.

This company was organized on September 11, 1900, with a capital stock of $30,000; the incorporators and directors were Titus Sheard, Frank Senior, Homer P. Snyder, Orville P. Purdy and Edwin I. Stinson.

"Ex. 1," page 80 of Record.

The capital stock of the company was issued to the organizers as follows:

| | | | |
|---|---|---|---|
| To Orville P. Purdy | 100 | Shares | $10,000 |
| For cash. | | | |
| To Titus Sheard | 25 | " | 2,500 |
| Frank Senior | 25 | " | 2,500 |
| Homer P. Snyder | 25 | " | 2,500 |
| Edwin I. Stinson | 25 | " | 2,500 |
| Paid for in machinery and supplies sold to the bankrupt by the H. P. Snyder Manufacturing Co. | | | |
| To Titus Sheard | 20 | " | 2,000 |
| Frank Senior | 20 | " | 2,000 |
| Homer P. Snyder | 20 | " | 2,000 |
| Edwin I. Stinson | 20 | " | 2,000 |
| Weyman Walker | 20 | " | 2,000 |
| Issued to these persons without any consideration passing from them to the corporation. | — | | — |
| | 300 | Shares | $30,000 |

Evidence of Edwin I. Stinson, page 9-11.
Evidence of Frank Senior, page 33-43.

There was located at Little Falls a corporation known as the Titus Sheard Company.

The Newport Knitting Company was one of the subsidiary companies of the Titus Sheard Corporation. The directors and officers of both companies were, substantially, the same. Edwin I. Stinson was a son-in-law and Frank Senior a nephew of Titus Sheard, who was president and financial head of both corporations. The books of the company were kept at its office from the organization of the company, Sept., 1900, to July, 1901, about ten months. After July, 1901, the account books of the Newport Knitting Company were brought to Little Falls and kept in the office of the Titus Sheard Company, in the same room as the books of the Sheard Company, and by the same person, at Little Falls at which place the defendant is located.

See evidence of Edwin I. Stinson, page 9-11.
Exhibits 11 and 12, page 75-76.

Titus Sheard died before the bringing of this suit. He was a director of the defendant and had been for many years prior to the transactions complained of. He was a personal friend of David Burrill, the president, and George D. Smith, the cashier, of the defendant.

Evidence of George D. Smith, page 47-8.

In the summer of 1903, the Titus Sheard Company became insolvent

and Mr. Burrill, president of the appellant, and Mr. C. A. Miller, one of its directors, undertook to assist this company in the liquidation of its affairs.

Evidence of George D. Smith, page 47-8; Exs. 10, 11, 12, 13, 14 and 15, page 71-9.

Consultations were had in the summer of 1903 between Mr. Burrill, president of defendant, the officers of the Sheard Company and the bankrupt company, when it appeared that these corporations were in financial straits and the defendant required that the Sheard Company secure the bank on its claims. This demand resulted in the execution by the officers of the Sheard Company, on its behalf and on their personal behalf, of, substantially, a general assignment to the defendant of all the property of the Titus Sheard Company and of the individual property of its directors and stockholders. The paper was dated August 8, 1903, and seems to have been executed August 11, 1903. It is known as "Ex. 10," page 71-5.

The $5,000 note in question, which was paid, less the unearned interest, was one of a series, the original of which was for $5,773.05 and was discounted January 8, 1901. This was a business note made by the Newport Knitting Company, endorsed by the Sheard Company, and discounted at the bank for the benefiit of the Titus Sheard Company. There were partial payments and renewals, from time to time, until May 11, 1903, when it was renewed for four months. On August 22nd, 1903, and before the note was due, it was again renewed for three months. The reason given by Mr. Smith, the cashier, for this renewal before the note was due was, "so that it could be collateral." This is the note in question. It was paid before due by a check of the Titus Sheard Company for $4,953.33, on September 26, 1903, which was the amount of the note, less the unearned interest; and, at the time, the Titus Sheard Company charged upon its books the amount of the note against the account of the Newport Knitting Company. The Newport Knitting Company, at that time, was a creditor of the Sheard Company to an amount in excess of the note, and credited the Sheard Company with the amount paid, viz., $4,953.33.

*This was all done by the same persons, acting for both companies, and entered on the books of both companies, which were kept in the same room.*

Evidence of George D. Smith, page 48-51.
Evidence of Edwin I. Stinson, pages 15-20, 25-7.
Evidence of George D. Smith, page 47-8.

Proceedings for the voluntary dissolution of the Newport Knitting

Company were instituted about the middle of October, 1903, and Edwin I. Stinson was appointed temporary receiver October 18, 1903, took possession of all the property of the corporation and continued in charge until he turned the same over to the plaintiff as receiver or trustee, in bankruptcy, of the Newport Knitting Company.

Evidence of Edwin I. Stinson, page 23.

On December 30, 1903, a petition in bankruptcy was filed against the Newport Knitting Company and an adjudication was had January 23, 1904, and plaintiff was thereafter appointed trustee.

Bill of Complaint, page 1.

Answer, page 5.

The Newport Knitting Company and the Titus Sheard Company were insolvent on September 26, 1903, when the note was paid. The operations of the Newport Knitting Company, at that time, had been practically suspended and work was never resumed after that in the plant. The Sheard Company was going through the process of voluntary liquidation under the agreement, "Ex. 10," at this time and had been since the 11th day of August, 1903.

## ARGUMENT.

### I WILL NOW ENDEAVOR TO SHOW THAT THE DISTRICT COURT WAS RIGHT IN HOLDING THAT THE PAYMENT OF THE NOTE WAS PREFERENTIAL AND THAT THE CIRCUIT COURT OF APPEALS WAS WRONG IN REVERSING THE DECISION.

Preferences are prohibited or declared voidable by Section 60 of the Bankrupt Law. The portion of the section applicable to this case is as follows:

> "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."
>
> "If a bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give preference, it shall be voidable by

the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

TO ENTITLE THE COMPLAINANT TO RECOVER IT WAS NECESSARY TO ESTABLISH THE FOLLOWING PROPOSITIONS, AND THEY WERE ESTABLISHED BY THE UNCONTRADICTED EVIDENCE:

*1.* That the debtor was insolvent at the time of the transfer or payment.

*2.* That there was a payment or transfer of property to defendant or for its benefit.

*3.* That the payment or transfer of property was a preference and that the recipient received more, upon its debt, than the other creditors of the bankrupt.

*4.* That the creditor knew or had reasonable cause to believe, that a preference was intended.

*5.* That the transfer was made within four months of filing the petition in bankruptcy.

AS TO THE FIRST ESSENTIAL, THAT THE BANKRUPT WAS INSOLVENT:

The District Court was right in holding that the bankrupt was insolvent on September 26, 1903. In discussing this point it is well to bear in mind that a fraud was perpetrated, by the organizers of the company, at the very outset of its existence. The citizens of Newport contracted to aid a proposed corporation in obtaining a plant in which to carry on its business at Newport. Their motive was to obtain the manufactory in the village and to assist the company by presenting to it the plant, which cost between $8,500 and $10,000. As soon as the property had been deeded over to the corporation, the officers appropriated this free gift of the citizens of Newport to their own personal benefit. Without any action of the board of directors, and without the slightest right to do so they issued $10,000 of the capital stock of the corporation to themselves in 5 certificates of 20 shares—$2,000 each. The gift by the citizens was not to the individuals who organized the company, but to the corporation itself and for its own benefit. The effect of this appropriation of the stock by the officers to their own use was to create a stock liability of $10,000 which did not, in reality, exist. Had the stock been held in the treasury,

or sold for cash, the corporation would have been $10,000 better off than it was.

*The corporation was insolvent.*

It is noteworthy that, although the evidence shows that 20 shares, $2,000, of the capital stock was issued in the name of Homer P. Snyder, he swears that he never received the certificate, nor did he know that it had been issued to him. These transactions concerning the stock throw light on all subsequent events involved in the case.

The financial condition of this company was, substantially, the same on the date on which the note was paid as when it was declared bankrupt. Mr. Stinson testifies that, in 1903, the company had no real estate nor tangible personal property, except its plant and the personal property in the plant at Newport; that it had no goods on commission, nor personal property purchased, unless it were purchased on credit; that the company met with no financial losses in 1903; that on the 26th day of September, 1903, it had no notes or bills receivable, except which had been discounted; that the condition of the company on September 26, 1903, the day the note was paid, was, substantially, the same as when he was appointed receiver, and that, as receiver, he turned over to plaintiff as trustee, all the property of the corporation, except what he had paid out for expenses.

Evidence of Stinson, pages 10-13, 22-5.

Senior testified, substantially, to the same effect.

Evidence of Senior, pages 37-8, 42-3.

The testimony of Stinson and Mason shows what was received for all the property and this *prima facie*, fixes the value, which was $20,036.74. This is the gross amount received irrespective of all allowance, discount, goods returned and expenses.

The trustee tried to sell the real estate and personal property separately and received bids in that manner, but received a higher bid for the whole together than for the property when offered separately.

Evidence of Mason, page 57.

The Court ordered the property sold in the manner described by Mason, and on such sale the selling price fixed the value.

The schedules and inventory, filed in this court, show the liabilities of the bankrupt.

Mr. Senior, vice president and general manager of the bankrupt, who verified the schedules and inventory, testified that the statement of indebtedness of the company, as set forth in the schedules, was

correct. The schedules were put in evidence and they show the indebtedness to be more than $65,272.95.

Evidence of Senior, page 43, Ex. 2 of Oct. 25, 1907.
Exhibit 2 of Oct. 25, 1907, page 86-90.

In this view of the case the following result is attained:

| | |
|---|---|
| Amount of the indebtedness | $65,272.95 |
| Value of estate | 20,036.74 |
| Deficiency | $45,236.21 |

Insolvency is shown in another way.

Mr. Senior stated that, by examining the notes attached to the proofs of debt, he could tell whether or not they were correct (Fol. 168). Many of the proofs founded on promisory notes, were shown him and he stated that the amounts claimed in the proofs were correct. These notes, irrespective of any other indebtedness, so proven, amount to $29,574.75, or $9,548.01 more than the gross estate.

Evidence of Senior, 40-2.

The complainant shows the insolvency of the bankrupt in still another way. The amount of property was established as above stated at $20,036.74. The complainant introduced in evidence proofs of debt to the amount of $51,662.63.

Page 94-5.

This evidence was supplemented by introducing dividend warrants under the seal of the Referee in Bankruptcy, showing that debts had been proven and allowed, upon which a dividend had been declared, to the amount of $66,231.66.

Page 91.
Evidence of Mason, 57-8.

The gross estate, as above stated, was $20,036.74. Deducting this amount from the total indebtedness as allowed by the Referee, and we have a deficit of $46,194.92. It is shown, therefore, that the company was insolvent at the time the $5,000 note, less unearned interest, was paid on September 26, 1903.

Evidence of Charles B. Mason, page 57.
Evidence of Edwin I. Stinson, page 28.

It is, therefore, clearly established that the District Court did not err in finding that the bankrupt was insolvent, at the time of the payment of the note to the defendant.

AS TO THE SECOND ESSENTIAL, THAT THERE WAS A PAYMENT OR TRANSFER OF PROPERTY.

In this case there is no dispute as to the payment. The cashier of

the defendant states that the note was paid in the manner and at the time claimed by the complainant. The evidence of the cashier makes out the case on this point without any other evidence on the part of the complainant.

Evidence of George D. Smith, page 47-8.

Section 1 of the Bankrupt Law defines a payment as a transfer within the meaning of that act.

AS TO THE THIRD ESSENTIAL, THAT THE TRANSFER WAS A PREFERENCE.

The payment was a preference and the defendant received a greater percentage on its claim than the other creditors of the bankrupt.

The defendant received its pay in full. No other creditor received more than twenty per cent. on his claim. This is shown by the fact that there are debts, proven and allowed by the Referee, amounting to $66,231.61 (Page 91). The evidence of Mr. Mason and Mr. Stinson show that the total gross amount of the estate is $20,036.74. Deduct necessary expenses and there will be left about $15,000 to be applied on the payment of debts.

AS TO THE FOURTH ESSENTIAL, THAT THE CREDITOR KNEW OR HAD REASONABLE CAUSE TO BELIEVE THE BANKRUPT INSOLVENT.

The District Court was right in finding that the defendant knew, or had reasonable cause to believe, that the bankrupt was insolvent on September 26, 1903, when the note was paid, and that the defendant knew this, or had reasonable cause to believe it, and that a preference was intended.

The burden of proof was on the complainant to show this, and the trial court held that it was proven, and the Circuit Court of Appeals did not hold differently on the question, but held that as matter of law there was no preference.

Opinion of Ray, page 98.

In this the District Court did not err. The bankrupt was insolvent at the time of the payment of the note, so was the Sheard Company, and the defendant knew, or had reasonable cause to believe such to be the case.

The Sheard Company had decided to go into liquidation prior to the payment of the note. It was unable to meet its obligations and made, August 11, 1903, what was, substantially, a general assignment

to the defendant in this suit. Prior to August 7, 1903, the question of the ability of the Sheard Company to pay its debts had arisen between that company and the bank. A consultation had taken place and Mr. Miller, one of the directors of the bank, wrote Mr. Burrill, August 7, 1903, on the subject of the liquidation of the Sheard Company's affairs. Enclosed in one of his letters of the above date, he set forth a plan for liquidation. This shows, clearly, that the bank was fully aware of the financial condition of this parent company at that time.

"Exs. 10, 11, 12 and 13, pages 75-7.

The condition of affairs must have been exceedingly urgent, for, the very next day after Miller's letter, the paper, which is substantially a general assignment, was prepared and on the 11th day of August, 1903, it was executed. This paper gives a detailed statement of the assets and liabilities of the parent company and, nominally, this statement shows the assets were perhaps equal to its indebtedness, but the Watertown indebtedness, $38,750, was not included, so the statement shows.

Page 72.

Little dependence can be given to such a statement as this, when subsequent events showed the company to be utterly insolvent and that the bank, its preferred creditor, was *not able to obtain its pay in full, except out of the individual property turned over to it by Titus Sheard, and the life insurance upon his own life transferred by his wife to the bank.* The bank would have been the loser to the amount of $46,000 or $47,000, had it not been for the insurance and the individual property of Sheard turned over to it. These amounts, Mr. Smith states, the bank obtained from the insurance and the individual property of Sheard.

See Record, Evidence of George D. Smith, page 80.

Mr. Stinson also swears that the Sheard Company failed to pay its debts.

Stinson Testimony, page 28-9.

It cannot be contended that the Sheard Company was not insolvent on August 11, 1903, and it is certain that the officers of the defendant, having the subject in charge, had knowledge of such fact. This company was in a worse condition September 26, 1903, than on August 11th, for it went from bad to worse. The bank knew the condition of both companies.

Upon this question there is no doubt. The Newport Knitting Company was the mere creature of the Titus Sheard Company, and the bank knew this, for, in the plan of liquidation proposed by Mr. Miller,

on August 7, 1903, and which was submitted to Mr. Burrill, for his consideration, Mr. Miller refers to the other companies as the "subsidiary companies" of the Sheard corporation.

Miller's letter to Burrill, August 7, 1907, "Ex. 12," and enclosure.

Then, it also appears that the officers and directors of the two companies were the same, and transactions between the two companies were carried on by the same persons on both sides and in the same room.

Applying the rule that whatever cannot be done directly cannot be done indirectly, we submit that the payment of the note to the defendant was by the Newport Knitting Company and not by the Titus Sheard Corporation. The Sheard Company was the means through which the payment was accomplished. This company owed the Newport Knitting Company more than $5,000 on September 26, 1903. The officers of both companies were the same; they had full knowledge of the financial conditions; both companies were bankrupt; a check was given, by the Sheard Company, to the bank for the note and the amount of the check was, immediately, charged against the Newport Company. In effect it was the same as if the Sheard Company gave its check to the Newport Knitting Company and that company took the check to the bank and paid the note. The personal actors in the transaction would have been the same in either case and would have acted in the same capacity and under the direction of the same man, namely, Titus Sheard, president of both companies, and the dictator of the operations of both. This was all with the knowledge of defendant, for, at this time, the bank absolutely controlled the Sheard Company under the assignment, and through this controlled the bankrupt company also.

In framing the Bankrupt Law Congress seemed to have in mind just such a transaction as this, for it provided that if a transfer was made so that a creditor was "*benefited*" although such transfer was not direct to the creditor, it should be deemed a preference.

It is not necessary that the transfer should be to the creditor; it may be to any other party provided the effect is to benefit the creditor. In other words, it matters not in what manner it is brought about, if the effect is accomplished the transaction is fraudulent under this statute.

Whatever knowledge Miller or Burrill had on the subject is imputed to the defendant. Burrill was the president of the bank and Mr. Smith says at page 80 of the Record that Mr. Burrill had charge of this matter for the bank. He called to his aid Mr. Miller, another di-

rector of the bank, therefore, for the purpose of this case—they were the bank.

The relations among all these actors in the transaction were so intimate that whatever one knew they all knew concerning the situation.

Sheard was president, director and stockholder in the Titus Sheard Company, the Newport Knitting Company, and the bank.

Stinson was secretary, director and bookkeeper of the Sheard Company and the Newport Knitting Company.

Stinson was also a son-in-law of Sheard.

Senior was vice-president, director, general manager and stockholder of the Newport Knitting Company; treasurer, director and general manager and stockholder of the Titus Sheard Company.

Senior was also a nephew of Titus Sheard.

How could Mr. Burrill, or any other man investigate the affairs of the Sheard Company and not investigate the affairs of the subsidiary company?

The $5,000 note, in suit, was made August 22nd, 1903, at three months, and would fall due November 22, 1903, but it was actually paid September 26th, one month and four days after it was given, and this was the renewal of a note that was not due at the time the renewal was made.

*The fact that the note was paid before due raises the presumption that the payment was preferential.*

Not a word of evidence was given to overcome the presumption. All the evidence tends to strengthen it.

It has been frequently held that any payment, out of the ordinary course of business, is presumptive evidence of the intent of the insolvent to give a preference.

*Graham v. Stork Fed.*, C., 5678.
*Walbrun v. Babbitt*, 16 Wal., 577.
*Hardy v. Gray*, 144 Fed. R., 922.
*Dokkin v. Page*, 147 Fed. R., 438.
*In re Gesas*, 146 Fed. R., 734.

There is no excuse given for paying the note before due—not a word of evidence in explanation. The fact that it was paid before due is sufficient to call upon the defendant for an explanation, but none was given nor attempted. It stands, therefore, established beyond controversy, that the insolvent Newport Knitting Company paid to the defendant the note of $5,000, less unearned interest, about two months before it fell due. The defendant, therefore, obtained 100

per cent. on a dollar of its debt, and other creditors of the bankrupt can only receive 15 or 20 per cent. The bank had knowledge, or reasonable cause to believe, it was receiving a preference when it accepted this payment.

If the bank did not know, nor have reasonable cause to believe that this note was uncollectable, why did it renew the former note on August 22nd, 1903, before it was due, and require security? And why did it demand that it be taken up before it fell due? Mr. Burrill, acting for the bank, had required that it be taken up in some way, and wrote Mr. Miller, September 16, 1903, that the note was to be taken up by a new note of the Sheard Company, with bills receivable as collateral.

Record, page 77, Ex. 13.

It is evident that, after this letter was written, the plan to take up the note was changed, that payment was required, and the Sheard Company gave its check to the bank and charged the Newport Company with the amount of the note. By this transaction the bankrupt parted with property to the amount of the note and the bank received it and was *benefited* to that amount. This was to the detriment of the other creditors of the bankrupt. To assume that Mr. Burrill, having the affair in charge, did not have knowledge of the condition of these two companies and of the transaction, would be to assume that he was an idiot.

How could Mr. Burrill have failed to have knowledge of the affairs of the Newport Knitting Company when, in fact, that and the Sheard Company were, substantially, one entity, except in name. The books of the two companies were kept in the same room and by the same person, Stinson. The real inside of the Titus Sheard Company would divulge the real inside of the Newport Knitting Company. Mr. Burrill knew September 19, 1903, what the condition was, and Mr. Sheard informed him that his proposed letter to Mr. Miller did not state the case correctly. Sheard says in this letter that the statement in the proposed letter is "a little too sanguine."

It is a singular circumstance that the bank accepted business paper as collateral security for the paper of the Sheard Company, yet this particular piece of business paper, the $5,000 note of the *Newport Knitting Company*, endorsed by the Sheard Company, with accounts as collateral, was singled out, by Mr. Burrill, as that which must be paid. Why, if this Newport Knitting Company was not believed to be insolvent, was Mr. Burrill anxious, in his own words, to "get this paper out of the way."

Letter September 16, 1903, page 77.

It is evident that the bank did not want the note upon its books. Burrill had insisted that the note should be gotten out of the way, although it was endorsed by the Sheard Company, and was secured by bills receivable as collateral. If the note was not undesirable, why get it out of the way? The bank thought it a poorer piece of paper than the note of the Sheard Company, which company the bank knew to be insolvent. The defendant held this $5,000 note, with the endorsement of the Sheard Company and collateral security, consisting of bills and accounts receivable, but insisted that the note be taken up before due. We ask what reason there was for this, except that the bank knew the company to be insolvent and desired immediate payment.

How could the trial court have found any different than it did on this question? Note the situation.

The bank held the note of this bankrupt, endorsed by the Titus Sheard Company, and bills and accounts receivable as collateral. Mr. Burrill says, in his letter of September 16, 1903, that the note is to be taken up, by a note of the Sheard Company, with bills receivable as collateral. That is, the bank is to release part of its security, for no consideration whatever, and is to take the note of the Sheard Company with bills receivable as collateral. If the bank at the time believed that the maker of the note had any responsibility, why did it voluntarily propose to release the Newport Knitting Company upon that note, and take a note of the insolvent Sheard Company with bills receivable as collateral, in its place?

In other words, can the court believe that any bank would, for no consideration whatever, release part of its security upon any note? If this was done by the Little Falls Bank, is it not the first instance in the history of the world?

Whatever knowledge or information Mr. Burrill or Mr. Miller had in regard to the condition of the Newport Knitting Company and the Sheard Company was derived in the course of their investigation of the condition of the Sheard Company, while acting for the defendant. The correspondence and the paper which we call the general assignment, shows the condition of the companies and, also, establishes, beyond question, that Mr. Burrill knew the condition of both companies. Mr. Smith, the cashier, swore that Mr. Burrill acted for the bank. The particular note in controversy was the only one which Mr. Burrill insisted on having gotten out of the way; was not the trial court right then in holding that the method of making the payment was a mere subterfuge to benefit the defendant to the prejudice of the general creditors of the bankrupt.

Evidence of Smith, page 80.

THE FACT THAT THE BANK HAD TAKEN WHAT WAS VIRTUALLY A GENERAL ASSIGNMENT FROM THE SHEARD COMPANY, IS MOST IMPORTANT.

This would seem to be a controlling fact. The bank had taken an assignment of all the effects of the Sheard Company and the undivided property of the officers connected with it. The bank was, therefore, in reality, the Titus Sheard Company. It, then, having stepped into the place of the Sheard Company, knew what the condition of the Newport Company was and how the note was paid and charged to the Newport Company, and that, by these transactions, a preference was intended and accomplished. Under the paper of August 11, which we call the general assignment, the Sheard Company had no right to pay the note except with the knowledge and consent of the bank, nor did it have the right to charge the amount of the note against the account of the Newport Company, on the books of the Sheard Company, unless it had the authority of the bank so to do.

Under the assignment the Sheard Company was to renew, in whole or in part, all bills payable held by other creditors than the defendant and as "found possible," and pay the balance not required in so doing to the defendant. Truly a most significant provision. What was it intended to do but to hold off other creditors until the four months had expired so that in case of bankruptcy the preference to the defendant would stand?

The books of both companies were kept by Stinson in the same room. The bank then, having the control of the Sheard Company and of the Sheard office, had also the control of the books of the bankrupt, for they were substantially one concern.

The statute has reaffirmed the common law in regard to the knowledge of an agent being imputed to the principal. That clause of the Bankrupt Law is as follows:

> "If the bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, *or his agent acting therein*, shall have had reasonable cause to believe that it was intended, thereby, to give a preference it shall be voidable by the trustee and he may recover the property or its value from such person."

It is not necessary that the transfer or payment should be direct to the defendant. If the effect of any transfer or payment is to prefer one creditor over the others, the transfer or payment will be set aside, for the benefit of the general creditors. The clause of the statute covering this subject reads as follows:

> "When the bankrupt shall give a preference and the person receiving it *or to be benefited thereby*," etc.

This clearly shows that it was the intent of Congress to declare voidable any transfer of property that benefited one creditor to the detriment of others, provided it were made within four months of the filing of the petition, and providing the creditor receiving the benefit knew, or had reasonable cause to believe, a preference was intended, no matter by what subterfuge it was effected.

*In re Sanderson*, 149 Fed. R., 273.
*In re Hockney v. Raymond*, 10 A. B. R., 213.
*In re Beerman*, 112 Fed. R., 663.
*Western Tie & Lumber Co. v. Brown*, 129 Fed. R., 728.
*Benjamin v. Chandler*, 142 Fed. R., 217.

The rule is that it is not necessary to show that a creditor has actual knowledge that the debtor is insolvent. The circumstances which would lead an ordinary prudent man to believe that a preference was intended is sufficient. In this case, however, the creditor had actual knowledge that the Newport Knitting Company was insolvent at the time of the payment.

*Sundheim v. Ridge Ave. Bank*, 138 Fed. R., 951.
*In re Himes*, 144 Fed. R., 543.
*In re Virginia Hard Wood Mfg. Co.*, 139 Fed. R., 209.
*Parker v. Black*, 143 Fed. R., 560.
*Webb v. Sachs*, No. 11,325 Fed. C.
*Coder v. McPherson*, 152 Fed. R., 951.

The conclusion is irresistible that the trial court did not err in finding that the defendant knew, or had reasonable cause to believe, that a preference was intended when it received payment of the note and the amount of the payment was charged to the bankrupt, and that this constituted a preferential payment under the Bankruptcy Law.

In this case the trial court found, on undisputed evidence, that the defendant knew, or had reasonable cause to believe, a preference was intended. The Court of Appeals does not differ with the trial court on this point, but held that considering the facts the appellant was not entitled to recover. The facts seem to bring this case under the rule frequently laid down by the courts as to what will be considered knowledge or reasonable cause to believe the debtor insolvent and that a preference is intended.

*Thomas v. Adelman*, 136 Fed. R., 973.
*West Philadelphia Bank v. Dixon*, 95 U. S., 180.
*Merchants' National Bank v. Cook*, 95 U. S., 342.
*Rogers v. Palmer*, 102 U. S., 263.
*Sage v. Wynkoop*, 104 U. S., 319.
*In re Eggert*, 102 Fed. R., 735.

*Sundheim v. Ridge Ave. Bank*, 138 Fed. R., 951.
*In re Himes*, 144 Fed. R., 543.
*In re Virginia Hard Wood Mfg. Co.*, 139 Fed. R., 209.
*Crook v. People's Nat. Bank*, 72 A. D., 331; affirmed 177 N. Y., 68.

The fundamental error of the learned judge who wrote the opinion in the Circuit Court of Appeals is in the very first line of his conclusion, after stating the facts. He says: "The one thing absolutely essential to a preference is that the bankrupt transfer some portion of his property to the creditor. If the creditor receive none of the bankrupt's property there is no preference."

If this is so the court has overruled the act of Congress, for that is not the letter nor the spirit of the statute. Not only is this true but inferentially the statute provides otherwise. It does not require that the transfer or payment must be made to the creditor, it provides that if a transfer is made, no matter to whom, if "the effect of the * * * * transfer will be to enable anyone of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class" the preference is effected. The learned Circuit Court entirely overlooked this part of the statute. The construction put upon the statute by the Circuit Court, if followed, would permit parties to evade the law in regard to preference in every case. To illustrate: A owes B $5,000; B owes C $5,000; A says to B I will pay C the $5,000 which you owe him and you credit me for the $5,000, which I owe you. Now assume that when this payment was made A was insolvent, and the intent of the parties was to evade the Bankrupt Law, and that within four months A became a bankrupt. Under the holding of the Circuit Court of Appeals there was no preference, because the creditor B had not received any "portion" of A's property. Is it possible that this is the true construction of the statute? If so, what becomes of that portion of the statute which is totally ignored by the Circuit Court of Appeals? That is, the provision which declares that a preference is made if the creditor receives the benefit of the transfer, although it was not made to him. Is there any difference in principle between this illustration and the facts in this case?

Sheard, president of both the insolvent companies and a director in the bank, takes the check of the insolvent Sheard Company to the bank and pays the note and credits the bankrupt with the amount of the note. Now if the bank has knowledge of these facts, as it certainly had, and knew that it was going to give the bank a preference, is it possible that this is not just such a case as is prohibited by the statute? The concise and clear manner in which Judge Ray

states the case is most convincing. Near the end of his opinion he says: "A short cut was taken, by common consent, and the check was passed to the bank and the amount charged to the Knitting Company, so that, in fact, it paid the note * * * *. It was a preference pure and simple, intended as such by all the parties to the transaction."

There is another phase of this question which is worthy of special attention. This court takes judicial notice of certain facts which are important here. In the House of Representatives there is, and always has been, a committee on the judiciary, whose duties are to pass upon certain bills before they are presented to the House. At the time the present Bankrupt Law was passed, George W. Ray, the judge who heard and decided this case in the trial court, was the Chairman of the Judiciary Committee of the House of Representatives and reported this bill to the House and advocated its passage by the House. Is it not, therefore, a legitimate conclusion to reach that he knew what was intended by Congress when it placed in the statute this equitable provision against a preference to certain favored creditors of a bankrupt?

## PAYMENT IS A TRANSFER OF PROPERTY WITHIN THE MEANING OF THE ACT.

Section 1, Subdivision 25, reads: "'Transfer' shall include the sale and every other and different mode of disposing or of parting with property, or the possession of property, absolutely or conditionally, as a *payment*, pledge, mortgage, gift or security."

## AS TO THE FIFTH ESSENTIAL, THAT THE TRANSFER WAS MADE WITHIN FOUR MONTHS OF THE FILING OF THE PETITION IN BANKRUPTCY.

There is no question as to the facts upon this point. The payment was made September 26, 1903, the petition in bankruptcy was filed December 30th, and the adjudication was had in January, 1904.

## THE COURT HAS JURISDICTION OF THIS SUIT.

It is claimed, by the appellee, that a court of equity has no jurisdiction of the case because the complainant has an adequate remedy at law. This question has been before the Federal Courts and decided in favor of the appellant's position here.

*Parker v. Black*, 143 Fed. R., 560.

*Bowman v. Alpha Farmes, etc.*, 153 Fed. R., 380.

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See also

*Holland v. Grate*, 193 N. Y., 262.

Decisions of the courts of the State of New York, on this question, are based on the Code of Civil Procedure of that State and are not controlling here.

The Federal courts have held that a payment is to be treated like any other voidable transfer of property, which requires the decision of a court of equity to declare void.

The Bankruptcy Law, Section 1, sub-division 25, provides that a payment shall be deemed a transfer.

The Federal courts hold that the suit is in the nature of a creditor's bill to recover property transferred in fraud of the Bankrupt Law. To declare such a transfer void is not the province of a jury. Juries may pronounce upon contracts and award the amount of money due, or they may find damage for torts, or find on specific questions of fact, on issues framed by direction of a court of equity, but it is not their province to declare fraudulent a transfer under the Bankrupt Law, whether such transfer be of money or other property. This is the province, alone, of a court of equity. The theory of the law is that the specific thing transferred is to be returned to the trustee in bankruptcy. If the specific thing be tangible personal property it must be returned, if possible, or, in case it cannot be returned, then the value of the property must be paid in money. If the transfer be of money the identical money is to be returned, but if this cannot be done then its equivalent must be paid to the trustee in bankruptcy. No decisions of the Federal courts have been found except in accordance with this theory of law.

The Circuit Court of Appeals in this case assumed that the suit was properly brought and proceeded to decide it on its merits.

If the Court should hold that the suit should have been on the law side of the court, then the appellant should be allowed to reform his bill and conform it to the practice in such cases. For unless this is done there is no remedy for appellant as the statute of limitation has run against the right of action.

THE JUDGMENT SHOULD BE AFFIRMED.

COOKINHAM & COOKINHAM,
*Solicitors for Appellant.*

HENRY J. COOKINHAM,
*of Counsel.*

Office Supreme Court, U. S.
FILED.
FEB 23 1912
JAMES H. McKENNEY,
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1911.

No. 172.

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NATIONAL BANK OF NEWPORT, NEW YORK,
*Appellant,*

*vs.*

NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS,
*Appellee.*

## A FEW SUGGESTIONS IN REPLY TO APPELLEE'S BRIEF.

It is stated by the learned judge who wrote the opinion in the Circuit Court of Appeals that the credit of $4,953.33 to the Knitting company by the Sheard company, when it took up the note, "was done with the knowledge and approval of the Newport company, but not so far as appears upon the record with the knowledge of the defendant."

(Page 106.)

The appellee's counsel, also, claims that there is no evidence to show that the defendant knew, or had reasonable cause to believe that a preference was intended. In view of the facts these statements are extraordinary. Defendant held paper of the Sheard company and paper endorsed by it to the amount of $160,000 (Record, page 52). Yet in the correspondence between Burrill, president, and Miller, a director of the bank, and the Sheard company, no other piece of paper is singled out to be "gotten out of the way," except this particular note, and yet the note was not due. Mr. Burrill called attention to this note in his letter to Miller, September 16, 1903.

He stated it was to be taken up by a note of the Sheard company, with accounts of the Sheard company as collateral, and that would get this piece of paper out of the way.

Observe the condition which existed between the parties at the time the letter was written.

The Knitting company and the Sheard company were insolvent; and the Sheard company had, more than a month previously, assigned

to the bank all its property of every description as collateral for all its indebtedness to the bank.

The bank then had the right and power to control every act of the Sheard company and to know what was done with every dollar of its property, how its books were kept and how it made its charges and credits.

In these surroundings, and just ten days after Burrill had written Miller that this note was to be gotten out of the way, and nearly two months before the note fell due, it was paid in the manner described and the same amount credited to the bankrupt company.

It is fair to infer that the actors in this transaction were of ordinary intelligence and that Burrill, president of the defendant and having absolute control of the situation, knew what was being done in regard to a transaction involving nearly $5,000. Yet appellee's counsel claims that there is no evidence that the defendant knew or had reasonable cause to believe a preference was intended.

Still further, it requires no stretch of imagination to see that the assignment of August 11, 1903, was made with a view of holding off creditors of the Sheard company, other than the bank, until four months had expired from the execution of the instrument, so that in case of bankruptcy of the Sheard company, the assignment would stand. Mark the wording of the assignment near the middle of page 74. It reads as follows:

> "With reference to bills payable held by creditors outside of the National Herkimer County Bank, we will renew same in whole or in part as may be found possible as long as may be necessary, and pay the balance not required in so doing to the National Herkimer County Bank in cancelling the notes held by it. All moneys received to be used in the payment of said indebtedness as fast as realized."

It is apparent that the intent here was to so manipulate the affairs of the Sheard company as to hold off the other creditors until the bank received its pay in full, which it did, while the other creditors of the Sheard company did not.

(Record, page 52.)

The defendant was paid $160,000 in full on its claim against the Sheard company, and its claim against the bankrupt company of $4,953.40 was paid in full, while the appellant could recover only about fifteen cents on a dollar of its $20,000 claim. Is this equity?

If then the bank was adroitly attempting to evade the Bankrupt law so far as the Sheard company was concerned and if it accom-

plished its object, is it not a legitimate inference to draw from the facts that it also was attempting the same thing in regard to the bankrupt Newport Knitting Company and that it accomplished its object there?

In the ordinary course of events business men pay their own debts and not the debts of their customers. If, then, the payment of the note was intended as an honest business transaction, why did not the Sheard company pay its debt of more than $5,000, to the Newport company, and let that company pay its note at the bank?

It cannot be claimed that the Sheard company distrusted the Knitting company and feared that if it paid that company's claim the Knitting company would not pay the note at the bank; for, the officers of the Sheard company were the officers of the Knitting company, so that they would have been the actors in both transactions.

The question is this: Why was not the proceeding carried on in the ordinary way? It cannot be claimed that it was necessary for the Sheard company to pay the note in order to release the special collateral (if there really was any); for, if the Knitting company paid the note the collateral would be released as completely as though the Sheard company paid it.

The only legitimate conclusion to be reached on all these facts, instead of upon some of them, as they are partially stated in the opinion of the Circuit Court of Appeals, is that the transaction, as carried on, was an effort to evade the Bankrupt law by all the parties connected with it and nothing less nor more.

We ask what significance there is in the argument of the learned counsel for the appellee, concerning off-sets or counter-claims? If the parties had honestly intended to do nothing but pay the note at the bank, and settle the accounts between the Sheard company and the Knitting company, and if they did not fear bankruptcy, the transaction would have been exceedingly simple. Under such circumstances it was only necessary for the Sheard company to pay the Knitting company its debt, and the Knitting company to pay the note at the bank. This would have been the business way of conducting the proceeding. No excuse or explanation is given for the circumlocution in this transaction, and it follows as a necessary conclusion that it was for other purposes than to release the collateral, and the only reason which suggests itself is that it was done to evade the Bankrupt law.

As Judge Ray says, "a short cut was taken by common consent and the check passed to the bank and the amount charged to the Knitting company."

The argument of appellee's counsel in which he claims that it would be inequitable to compel the bank to pay because it had delivered up to the Sheard Company the collateral $6,300 in accounts when the note was paid, is a singular one in view of the facts in this case.

The learned judge, also, who delivered the opinion in the Circuit Court of Appeals fell into an error in coming to his conclusion upon this point, by assuming that the bank had parted with some security when the note was paid. *Such is not the case.* Mr. Smith, cashier of the defendant, and the only witness who speaks upon the subject, states that when the note was paid the collateral $6,300.00 in accounts was delivered to the Sheard company.

(Record, page 31.)

Suppose such was the case the defendant parted with no value. By the assignment executed August 11, 1903, "Ex. 10," page 74, all property of the Sheard company, including all its bills and accounts receivable, was transferred to the defendant as security for all its indebtedness, and the Sheard company's endorsement held by the bank.

The note in question was made August 22, 1903, and was the renewal of a note not due. Mr. Smith says the object of making a new note, was so that it could be "collateralled" by bills receivable of the Sheard company.

Now we ask:

*First:* Why was it necessary to make a new note in place of one not yet due in order to collateral it? Could not the Sheard company have turned over to the bank accounts receivable (if it had any) to secure the note then held by the bank as well as to secure the new note?

*Second:* How could the Sheard company, which had already transferred every bill and account receivable which it owned and all its other property to the defendant as collateral security for the entire indebtedness to the defendant, *put up a part of the same collateral as additional collateral for this particular note in question?* Moreover, when the note was paid and the collateral (if such was the case) delivered by the defendant to the Sheard company, the collateral still remained the property of the defendant as security for all the remaining indebtedness of the Sheard company to the defendant. The effect, therefore, of the transaction, when all the facts are stated just as defendant claims they existed, was not to the injury

of the bank, nor did the bank in reality part with its lien on a single dollar's worth of property which it held as collateral or otherwise. On the contrary, the bank was benefited by the transaction to the extent of having the note of the bankrupt company for $4,953.40 paid in cash.

The truth of the matter is that the whole complicated proceeding from beginning to end was an attempt on the part of the three corporations, to evade the Bankrupt law.

The Circuit Court of Appeals based its decision upon an erroneous statement of law and upon a partial statement of facts and therefore came to an erroneous conclusion in reversing the judgment, while Judge Ray based his decision upon all the facts in the case and came to a correct conclusion as to the law applicable to such facts.

In the last analysis, then, the condition of the parties was as follows:

The Sheard company actually parted with nothing, because it received from the Newport company precisely the same amount that it had turned over to the bank. It was simply a "go-between" of the other companies to further their ends.

The Bankrupt company had paid its note of $4,953.40 to the bank and, therefore, had transferred so much of its property through the medium of the Sheard company to the defendant.

The bank had received the payment of the note of the Bankrupt company, which was not due, and upon which was paid $4,953.40, and if it parted with any specific accounts receivable, held as collateral for that note, it still held the accounts as collateral for all its other indebtedness under the general assignment.

Is it not, therefore, established that Judge Ray's solution of the situation was the correct one, and that the preference was effectually accomplished, with the knowledge of all three of the corporations acting in concert to the detriment of the general creditors of the bankrupt?

It is contended by the appellant that the question of whether the remedy is by suit in equity or by an action at law cannot be raised here.

The Circuit Court of Appeals necessarily held that the suit was properly brought because it decided the case on its merits. If, therefore, appellee intended to raise that question here it should have appealed from that part of the decision of the Circuit Court of Appeals.

The decision and order should be reversed, and the Judgment of the District Court affirmed.

HENRY J. COOKINHAM,
*Counsel for Appellant,*
No. 122 Genesee Street,
Utica, N. Y.

# BRIEF FOR APPELLEE.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM**, 1911.

Office Supreme Court, U. S.
FILED.
JAN 22 1912
JAMES H. McKENNEY,
CLERK.

**No. 172.**

NATIONAL BANK OF NEWPORT, NEW YORK,
APPELLANT,

*vs*

NATIONAL HERKIMER COUNTY BANK OF LITTLE
FALLS, NEW YORK, APPELLEE.

MYRON G. BRONNER,
Solicitor for Appellee,
5 and 7 Journal and Courier Building,
Little Falls, New York.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1911.

## No. 172.

NATIONAL BANK OF NEWPORT, New York,
Appellant,
against
THE NATIONAL HERKIMER COUNTY BANK of Little Falls,
Defendant and Appellee.

**BRIEF FOR APPELLEE.**

### STATEMENT OF FACTS.

This cause arose in the District Court of the Northern District of the State of New York. The action was originally brought in equity by Charles B. Mason as Trustee in Bankruptcy of the Newport Knitting Company, to recover the sum of Five Thousand Dollars, which such Trustee in Bankruptcy claimed had been paid to the defendant on September 26th, 1903, in payment of a note of the bankrupt, the Newport Knitting Company, while the said Knitting Company was insolvent and within four months before the petition in bankruptcy was filed against it; that at the time of such payment the defendant knew, or had reasonable cause to believe, the said Newport Knitting Company was insolvent, and unable to pay its debts, and that the payment was made with the intent to prefer the defendant over the other creditors of the bankrupt; that the defendant received such payment with knowledge, or reasonable cause to believe, that it was intended as a preference to it. The complainant also further alleged that he had no adequate relief at law, and demanded that the defendant be decreed to account for the said money. (Transcript of record, Fols. 2-4.)

The defendant by its answer denied that the bankrupt was insolvent at the time of the payment; that the bankrupt paid to the defendant the money alleged in the complaint; that the payment was made with intent to prefer the defendant; that the defendant had knowledge at the time of such payment that the bankrupt was insolvent; that the defendant had reasonable cause to believe that the said bankrupt was insolvent; that the defendant received the payment with knowledge, or reasonable cause to believe, that it was intended as a preference; that by the payment it received a greater percentage of the assets of said bankrupt than its other creditors; and denied that the complainant had no adequate remedy or relief at law.

The defendant by its answer alleged, as a further defense, that the complainant had an adequate remedy at law for damages against the defendant, who was solvent and able to respond to any claim that might be established herein against it. (Transcript of record, Fols. 7-9.)

The evidence in the case was taken before a Notary Public acting as examiner, and by him reported to the Court.

The case was heard before Honorable George W. Ray, Judge, at a term of the District Court for the Northern District of New York; and after hearing the case, the Judge on the 14th of September, 1908, filed his opinion in favor of the complainant. (Transcript of record, Fols. 138-142.)

On the 26th of September, 1908, final decree was made by the Court in favor of the complainant against the defendant, which was entered with the Clerk of the Court at Utica, N. Y., on the 28th of September, 1908. By the decree it was adjudged that the complainant recover of the defendant the sum of $6439.46, with costs. (Transcript of record, Fols. 11-12.)

From that judgment the defendant appealed to the United States Circuit Court of Appeals, in and for the Second District, by its petition of appeal, which was allowed by the District Judge on the 19th of December, 1908. (Transcript of record, Fols. 142-144.)

On such appeal the defendant made its assignment of errors, which, with its petition of appeal, was filed December 31, 1908. (Transcript of record, Fols. 147-150.)

This appeal was heard on May 18, 1909, before Justices Lacombe, Coxe and Noyes of the United Circuit Court of Ap-

peals, which Court delivered an opinion by Mr. Justice Noyes on July 21, 1909, directing that the judgment of the District Court of the Northern District of New York should be reversed, with costs, and the case remanded to the lower Court with instructions to dismiss the bill with costs, pursuant to which a decree of reversal was made and entered on August 6, 1909. (Transcript of record, Fols. 154-160.)

Thereafter the original complainant, having assigned his claim and alleged cause of action to the National Bank of Newport, New York, an order was made by said Circuit Court of Appeals substituting the latter as complainant, which order was entered November 9, 1909. (Transcript of record, Fols. 163-4.)

Afterwards the present complainant filed an assignment of error and made a petition of appeal to this Court, which was allowed November 22, 1909. (Transcript of record, Fols. 166-170.)

The defendant is, and at all times in this action referred to was, a National Bank, located and doing buisness at Little Falls, in Herkimer county, N. Y. In 1903, and until about the middle of October, 1903, the bankrupt, the Newport Knitting Company, was a manufacturing corporation organized under the laws of the State of New York, located and carrying on the business of manufacturing and selling knit goods at Newport, in the County of Herkimer, N. Y. The said company was organized in the year 1900 and continued until about November, 1903, when it was dissolved by voluntary dissolution under the Statute of the State of New York.

The Titus Sheard Company was a domestic corporation organized under the laws of the State of New York and had been for some twenty years, located at Little Falls, N. Y., in the business of manufacturing and selling knit goods.

The said Titus Sheard Company at all the times referred to in this action, was a customer of the defendant, keeping its bank account there and carrying a large line of discount of its own paper and paper of its customers.

As considerable effort was expended by the appellant, in the lower Court, in stating the facts with reference to the organization and capitalization of the Newport Knitting Company, and its relations, through its officers and directors and otherwise, with the Titus Sheard Company and H. P. Snyder Manu-

facturing Company, (matters which we believe to be of no consequence here) warrants devoting a little space to those subjects on behalf of the appellee.

The Newport Knitting Company was organized about August, 1900, with an authorized capital stock of Thirty Thousand Dollars ($30,000.00), and Titus Sheard, Frank Senior, Homer P. Snyder, Orville N. Purdy and Edwin I. Stinson were named as directors in the Certificate of Incorporation.

Transcript of Record, pages 80-81.

In May, 1900, certain citizens of the village of Newport entered into written agreement with Titus Sheard, whereby they bound themselves to convey certain property lately owned by the Newport Improvement Company, together with mill buildings to be erected by them thereon, to said Sheard, on October 1st, 1900, in consideration of which said Sheard agreed to equip the building and run twenty-five knitting machines for a period of five years, three hundred days in each year.

Transcript of Record, pages 61 and 62.

In furtherance of this plan, the capital stock of the Newport Knitting Company was issued as follows:

To Orville N. Purdy, 100 shares, for cash actually paid in $10,000.00. (Cross examination of Frank Senior, question 2 on page 43 of record.)

To Titus Sheard, Frank Senior and Homer P. Snyder, twenty-five shares each, paid for by machinery sold the Newport Knitting Company by the H. P. Snyder Manufacturing Company, and for which the H. P. Snyder Manufacturing Company was reimbursed through dividends declared on its capital stock, due to said Sheard, Senior and Snyder, who were stockholders thereof. (Examination of Frank Senior, question 31, page 35, and cross examination of same witness on page 43, question 3; examination of Homer P. Snyder, page 54, questions 12 and 13.)

Edwin I. Stinson, twenty-five shares, paid for by an indebtedness from the Newport Knitting Company to Titus Sheard Company, and adjusted by Mr. Stinson delivering to Titus Sheard his note for the amount. (Cross examination of Frank Senior on page 44, questions 6 and 7.)

To Titus Sheard, Frank Senior, Homer P. Snyder, Edwin I.

Stinson and Weyman Walker, twenty shares each, for the agreed value of the real estate which the Newport Improvement Company was to improve and convey to Titus Sheard. (Cross examination of Frank Senior, page 44, questions 4 and 5; page 38, questions 70, 71 and 72; page 46, question 6.)

Homer P. Snyder, as a witness for complainant, denied ever having received the twenty shares made out to him. (Testimony of Homer P. Snyder, page 53, questions 7 to 10.)

The citizens of Newport, in futherance of their agreement with Sheard, collected something like Eight Thousand Dollars, and the premises upon which the mill was erected were purchased of William D. Grant and wife, George West and Eugene West, and Patrick Toomey and wife, and were conveyed directly to the Newport Knitting Company.

Testimony of Daniel P. Wooster, pages 65 and 66.
Grant deed, page 82.
West deed, page 83.
Toomey deed, page 85.

The money for this purpose was raised under a Subscription Agreement, dated April 4, 1900, whereby the subscribers agreed to pay the sum set opposite their respective names, to the National Bank of Newport as Treasurer, to be used by the committee in charge for the purpose of purchasing the site and erecting the mill building which was to be operated by a company to be organized by Titus Sheard, such money to be at the disposal of the Building Committee, and to be used by them as a majority of said Committee might deem best for the interest of the Village of Newport.

Subscription Agreement, page 67.

The Building Committee met and discussed, considered and decided upon the different steps to be taken concerning the purchase of the property and the erection of the building thereon, and of the conveyance of the same to the Newport Knitting Company, and authorized the conveyance of the property to the Newport Knitting Company direct, after which it was fitted with machinery and operated for a considerable time by the Newport Knitting Company.

Cross examination of Daniel P. Wooster, pages 67, 68, 69.

After the property had been conveyed to the Newport Knitting Company, that Company signed a certificate that the terms of the original agreement between the citizens of Newport and Titus Sheard had been complied with.

Transcript of record, page 63.

The Newport Knitting Company and H. P. Snyder Manufacturing Company were independent corporations, engaged in independent and separate kinds of business, and in no manner subsidiary to the Titus Sheard Company.

The books of the Newport Knitting Company were kept at Newport by Weyman Walker, the bookkeeper, until July, 1901, when they were taken to Little Falls and were kept by Edwin I. Stinson at the office of the Titus Sheard Company. The books of Titus Sheard Company were kept by S. M. Smith, bookkeeper, and in a different room from the one occupied by Mr. Stinson as bookkeeper for the Newport Knitting Company.

Examination of Edwin I. Stinson, page 12, questions 56 to 63.

The following table will show the offices held by each of the parties in the different corporations mentioned in the evidence:

| NAME OF CORPORATION | SHEARD | SENIOR | STINSON | SNYDER | PURDY |
|---|---|---|---|---|---|
| Newport Knitting Co. | Director | Director Gen. Mgr. | Secretary Bookkeeper | Director | Director Treasurer |
| TitusSheard Company | President Director | Vice-President Director Gen. Mgr. | Director Secretary | | |
| H. P. Snyder Manufacturing Company | President Director | Director | | Director | |
| Nat'l Herkimer County Bank | Director | | | | |

Testimony E. I. Stinson, page 9, questions 9 and 10; page 18, questions 66, 67 and 68; testimony of Frank Senior, page 34, questions 14, 15 and 16.

On January 7th, 1901, the Newport Knitting Company made its note to the Titus Sheard Company payable at the National Herkimer County Bank at four months. That note was given in payment for machinery and supplies sold by the Titus Sheard Company to the maker of this note. (Transcript of record, page 25, Fol. 36.)

The Titus Sheard Company took the note to the defendant, National Herkimer County Bank, and in the regular course of business, it was discounted for the benefit of the Titus Sheard Company, the proceeds being placed to the credit of that company and being drawn out by its check. (Transcript of record, page 45, Fols. 63-4 and page 49, Fols. 68-71.) The note was renewed every four months, except that it was reduced to Five Thousand Dollars. On May 11th, 1903, the note was again renewed by a four months note, which matured September 11th, 1903. That note was payable to the order of the Titus Sheard Company and indorsed by that Company, as all the notes in the series had been. In the month of August, 1903, there were negotiations between the defendant and the Titus Sheard Company for the purpose of arranging to have the said Titus Sheard Company pay off and secure a large indebtedness of it to the defendant, and it was agreed that the Titus Sheard Company would secure this Five Thousand Dollar note of the Newport Knitting Company. (Transcript of record, page 71, Fols. 100-103, 105, 110-112.) In pursuance of that agreement the cashier of the defendant called on Titus Sheard, who was then the President of the Titus Sheard Company, and stated that the note of the Newport Knitting Company should have been collateraled when it was renewed in May, 1903. Mr. Sheard agreed that there should be collateral security. By the arrangement a new note for Five Thousand Dollars made by the Newport Knitting Company, dated August 22nd, 1903, payable at three months, was delivered to the defendant in the place of the said note of May 11th, 1903, and as collateral to the said note of August 22nd, 1903, the Titus Sheard Company assigned and delivered to the defendant, certain accounts receivable for merchandise sold, to the amount of Six Thousand Three Hundred Dollars, which accounts were the property of the Titus Sheard Company, and in which the Newport Knitting Company, the bankrupt, had no interest or title. (Transcript of record, page 50, Fols. 69-71, 72, 73, 113.)

On September 26th, 1903, Mr. Titus Sheard went to the banking house of the defendant, and stated that he wished to take up the aforesaid note of August 22d, 1903, if the Bank would credit back the unearned interest, which was agreed to. Thereupon the check of the Titus Sheard Company for $4,953.43, being Five Thousand Dollars, less the unearned interest, was given to the defendant, and the defendant upon receiving it delivered to the said Titus Sheard Company the aforesaid note of the Newport Knitting Company and all the collateral which the defendant held as security for the payment thereof.

The check which the defendant received was charged to the account and paid out of the funds of the Titus Sheard Company. (Transcript of record, page 51, Fol. 71.) This payment to the defendant is the transaction which is complained of and which, it is claimed, affected an avoidable transfer of the property of the bankrupt, the Newport Knitting Company, to the defendant, and was an unlawful preference in its favor.

The petition in bankruptcy against the Newport Knitting Company was presented December 30th, 1903.

The bankrupt was not, and never had been, a customer of the defendant. The defendant had held no other note of the bankrupt than the one in question and the preceeding ones in that series. (Transcript of record, page 51, Fol. 71.) The bankrupt's place of business was twenty-two miles distant from Little Falls where defendant was located. The defendant never had any transaction, or interview, whatever with the bankrupt about the note in question or any of the matters involved herein. (Transcript of record, page 28, Fol. 40; page 51, Fol. 71.)

It appears that the Titus Sheard Company had an open account for merchandise, etc., with the Newport Knitting Company, and that upon taking up the aforesaid note the Titus Sheard Company charged the amount which it had paid to the defendant against the Newport Knitting Company in the said account. The statement of that account, including the said charge, is as follows:

Titus Sheard Company, Dr.

| | | |
|---|---|---|
| 1903 | September 26th, debit balance | $4429 71 |
| | Various items debited from September 26th to October 1st. | 1068 10 |
| | | $5497 81 |

Titus Sheard Company, Cr.

| | | |
|---|---|---|
| September 26th, amount of note paid, less $46.07 interest | $4953 43 | |
| Titus Sheard personal account | 760 00 | |
| Titus Sheard Company's purchase account | 582 72 | |
| Total | | $6299 15 |
| Less debit items as above | | $5497 81 |
| Balance due Titus Sheard Company Oct. 1st 1903 | | $801 34 |

The defendant had no knowledge or information whatever of an account between Titus Sheard Company and the Newport Knitting Company, nor of the condition thereof. It was not informed of the fact that the amount paid to the defendant was charged against the Newport Knitting Company. The bankrupt continued business making and shipping goods in the regular way until October 10th, 1903. (Transcript of record, page 31, Fol. 44.)

In August, 1903, there was an arrangement between the defendant and the Titus Sheard Company by which a large debt of the Company to this bank was provided for, secured and paid. A statement of the liabilities and assets of the Titus Sheard Company was made which showed it to be solvent. (Transcript, page 70, Fol. 99; page 73, Fol. 103.) There is no reference in this statement to the Newport Knitting Company, except it is stated that the Titus Sheard Company was to give its accounts receivable as security for the note, which was done. Transcript of record, page 70, Fol. 79; page 99, Fol. 112.)

## POINT I.

**There was no transaction between the bankrupt and the defendant concerning the payment of the money in question or with reference to the note for which the money was paid.**

The original note of the series of which the note in question was the last, was given in the regular course of business in the year 1901 to the Titus Sheard Company in payment for machinery and supplies which were bought of the said last named Company. (Transcript of record, page 25, Fol. 36.) That original note was clearly the property of the Titus Sheard Company to do with as it pleased. For its own benefit, it negotiated and transferred the note in the usual course of business to the defendant. The Titus Sheard Company indorsed the note and the proceeds were placed to its credit in its account with the defendant and used by that Company. (Transcript of record, page 49, Fol. 68.) The renewals of the note from time to time were procured and delivered to the defendant by the Titus Sheard Company. The debt was regarded and treated by the defendant as the debt of the Titus Sheard Company.

By a rule of the government which applies to National Banks, after commercial paper which is discounted for the payee becomes due and is renewed at the request of the indorser, the indorser is regarded and treated as the principal debtor. It was to the Titus Sheard Company that the defendant looked to secure and pay this note. The defendant requested the Titus Sheard Company to secure the debt by a deposit of collateral, which it did, by pledging certain accounts receivable to the amount of $6300, which belonged to and were solely held by the Titus Sheard Company. In that collateral the Newport Knitting Company had no interest whatever. (Transcript of record, page 50, Fol. 70.)

This was the situation on the 26th of September, 1903. The Titus Sheard Company being indorser on the note, proposed to the defendant to take back the note, on being allowed the unearned interest. By so doing the Titus Sheard Company would receive the note back into its ownership and accomplish the release from pledge of Six Thousand Three Hundred Dollars of its accounts receivable. That was done. The Titus Sheard Company gave the defendant its check on its account with the defendant, and the defendant delivered to the said Company

the note and the collateral. (Transcript of record, page 51, Fol. 71.) There was no transaction with or reference to the bankrupt. The whole matter so far as the defendant was in it, consisted of a purchase of the note by the defendant from the Titus Sheard Company with the collateral of the last named company pledged as security and a taking up of the note by the Titus Sheard Company, who was liable as indorser. All of this was done without any reference to or transaction with the Newport Knitting Company.

It is true that Titus Sheard, who conducted the transaction, was a director of the Newport Knitting Company, but it does not appear that he was any other officer of that Company and he was acting in this matter solely for the Titus Sheard Company, of which he was the President.

## POINT II.

**No property of the bankrupt, the Newport Knitting Company, was transfered to the defendant in violation of the bankruptcy law.**

(a) Section 60 of that law, which is involved in this case, is as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has * * * procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The money which was paid to the defendant was plainly the money of the Titus Sheard Company. A check on its funds for $4953.43 was given by the Titus Sheard Company directly to the defendant and paid out of its moneys. (Transcript of record, page 51, Fol. 71.) The Newport Knitting Company was in no way a party to that check or to its payment. It had no interest whatever in the moneys with which the check was paid. The bankrupt's note was not paid or satisfied when the money had been paid to the defendant, and the note, with the collateral, delivered to the Titus Sheard Company. The Newport Knitting Company was in no different situation as to the amount of its debt, or its money or property, than it was before.

How can this complainant say that the money which was paid to the defendant is, or was, the property of the bankrupt, and that it ought to have come to him as part of the assets?

If the check had not been given and the money remained with the defendant in the account of the Titus Sheard Company, the complainant in this action would not have had a claim to it. Clearly the passing of the money to the defendant was not a transfer of the property of the bankrupt.

(b) The fact that the Titus Sheard Company charged to the Newport Knitting Company the amount which it had paid to the defendant, does not make a transfer of the property of the bankrupt to the defendant, or an unlawful preference to it of its demand.

For some time prior to September 26th, 1903, there had been a running account between the two companies, and on that date it showed that the Newport Knitting Company owed the Titus Sheard Company $4429.71. There were further transactions, so that at the time when the petition was presented there was an obligation of the Titus Sheard Company, on the debit side of the account, for $5497.84.

This account was made in the regular course of business by an exchange of supplies, and the Titus Sheard Company had purchased of the Newport Knitting Company, of its manufactured goods, paying the same price as its other purchasers, in fact a little better price, because it did not take five per cent commission as did other concerns. (Transcript of record, page 45, Fol. 62.)

The Bankruptcy Law, Section 68, Sud-division b, provides:

"A setoff or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate, or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

If this note, which was taken up from the defendant on the 26th of September by the Titus Sheard Company, was obtained by that Company with a view to using it as a counterclaim against its debt to the insolvent bankrupt, of which insolvency

the said Company had notice, it is obvious that such use could not be made of it. It is within the prohibition of Section 68 and the plan of making it a counterclaim would fail. It could not, and did not, work a transfer of any of the property of the bankrupt. The Trustee could repudiate his claim as a counterclaim and collect from Titus Sheard Company the money it owed to the bankrupt in the same manner as though the note still remained with the defendant.

In any event this defendant had no knowledge, or information, of any purpose of the Titus Sheard Company to use the note as a counterclaim and no reason to believe it was to be so used. It had no knowledge or information of any account between the two companies. It did not know or have reason to suppose that there was an opportunity to use this claim as a counterclaim.

It cannot be said that the property of the bankrupt has been transferred to the defendant by the operation of a counterclaim of which the defendant was wholly and entirely ignorant.

There is only one basis upon which it can be said there could be any prohibited transfer of the property of the defendant in this case, and that is to assume that there was a conspiracy or collusive agreement between the defendant and the Titus Sheard Company by which this claim was to be transferred to the Titus Sheard Company for the purpose and with a view of having it used by the last named Company as a counterclaim against its debt to the bankrupt, whom the defendant and Titus Sheard Company knew, or had reason to believe, was insolvent. That assumption cannot serve to establish an unlawful transfer of property in this case, because there is absolutely no evidence to show that the defendant was a party to such an arrangement, or had any knowledge or information thereof, or reason to suppose that such a purpose existed. And in the next place if that assumption was true, and the arrangement existed just as stated, it would be entirely void and inoperative to transfer any property of the bankrupt or impair its assets in any degree. The Trustee of the bankrupt should have repudiated the counterclaim and sued Titus Sheard Company, and could have collected all the money which it owed to the bankrupt in the same manner as though the transfer of the so called counterclaim had not been made.

It will be observed that it is not a question whether the coun-

terclaim is avoidable, but the language of the statute is "shall not be allowed in favor of any debtor."

That is precisely the remedy to which this complainant is entitled. He can sue Titus Sheard Company for the money it owed, refuse to allow the counterclaim and recover of that Company. He cannot recover of the defendant, because no property or assets of the bankrupt have passed to the defendant or have been transferred to the defendant. If anybody obtained a preference in this case, as to the bankrupt, it is the Titus Sheard Company, and if its act was an attempt to secure a preference to itself, it is invalid, and all the rights of the bankrupt to its property and assets remain.

## POINT III.

**There was no preference extended or made to the defendant Bank, as a creditor of the bankrupt.**

The defendant Bank was not as a creditor of or a party to any transaction with the bankrupt or concerning its assets or property.

The learned District Judge in rendering the decision in the trial Court, which has been reversed, argued and assumed that the Titus Sheard Company knowing the financial condition and insolvency of the Newport Knitting Company, intended a preference to the bank and the bank was seeking and intending to obtain and receive a preference over the other creditors of said bankrupt. There is nowhere a particle of proof that the defendant, The National Herkimer County Bank, knew or had any information or had sufficient reason to understand that the Newport Knitting Company owed a dollar of indebtedness to any other creditor. There is no line of evidence in all the transactions which took place between the Bank and the Titus Sheard Company with reference to the so called securing or liquidation of its debt which suggests anything about the condition of the Newport Knitting Company.

In the agreement between the defendant and the Titus Sheard Company for securing the obligations of the latter it is said that the note of the Titus Sheard Company will be given, with collateral security, in the place of the note of the Newport Knitting Company. (Transcript of record, page 77, Fol. 110.) The National Herkimer County Bank held this note for Five

Thousand Dollars, indorsed by Titus Sheard Company, and was abundantly secured by collateral of that Company, some Thirteen Hundred Dollars in excess value of the amount of the note. It had no anxiety about this debt. It was seeking no preference of this debt; it was not asking payment. All the bank did was when the indorser, who was the only debtor with whom the bank dealt, applied to it to get his collateral by paying the amount of the note, less the unearned interest, the bank assented in a regular, proper and legitimate manner; accepted the money and surrendered the collateral with the note. The bank was then no longer a creditor of the Newport Knitting Company. There had been and was no transaction between the defendant Bank, and the Newport Knitting Company.

After this had been done the indorser, Titus Sheard Company, became the creditor of the Newport Knitting Company. The Negotiable Instruments Law of the State of New York, Section 202, provides:

"Where the instrument is paid by the party secondarily liable thereon it is not discharged; but the party so paying is remitted to his former rights as regards all prior parties and he may strike out his own and all subsequent indorsements and negotiate the instrument. * * * "

If anything occurred after that in the direction of making a preference of the payment of this note the defendant Bank, was in no way a party to it, or interested in it. It could not be, it was not a creditor.

Suppose that when the Titus Sheard Company on the 26th of September, 1903, came to the bank and proposed to pay the note, the bank had declined and waited until the note was due, then the indorser, the Titus Sheard Company, could have tendered the money and compelled the defendant to take it and deliver the note and the collateral. Would there in that case have been any less or more a preference than in the case at bar? Suppose that in that case the defendant, when the note was passed over to the Titus Sheard Company, had full knowledge of the insolvency of the Newport Knitting Company and of its intent and the intent of the Titus Sheard Company to prefer this debt, would it have made any difference, or change the Negotiable Instruments Law to the effect that the indorser, tendering the money for the note, is entitled to have the note passed over to him undischarged?

## POINT IV.

**When the defendant received the money on this note from the Titus Sheard Company it had no reasonable cause to believe that the payment was intended as a preference within the provisions of the Bankruptcy Law.**

In the case of Carson, Pirie, Scott & Co. v. Chicago Title & Trust Co., 182 U. S., 446, Mr. Justice McKenna in his opinion says:

"Subdivisions 'a' and 'b' are concerned with a preference "given by a debtor to his creditor. Subdivision 'a' defines "what shall constitute it, and subdivision 'b' states a conse- "quence of it—gives a remedy against it. The former defines "it to be a transfer of property which will enable him to whom "the transfer is made to obtain a greater percentage of his "debt than other creditors. The latter provides a consequence "to be that the transfer may be avoided by the trustee and the "property or its value recovered, provided however, that the "preference was given within four months before the filing of "the petition in bankruptcy or before the adjudication, and the "creditor had reason to believe a preference was intended. So "far, so clear. If the conditions mentioned exist, the prefer- "ence may be avoided. But if the person receiving the pref- "erence did not have cause to believe it was intended, what "then? It follows that the condition being absent, its effect "will be absent. In other words, he may keep the property "transferred to him, whether it be a complete or partial dis- "charge of his debt."

Where there is no evidence tending to show that the creditor had reasonable cause to believe that payments made by the bankrupt were intended as a preference, a recovery cannot be had, the law presuming that such payments are legal, and the burden of proof is on the trustee seeking to recover them to overcome this presumption.

> Keith v. Gettysburg Nat. Bank, 23 Supr. (Pa.,) 14.
> Deland v. Miller & Cheney Bank, 119 Iowa, 368.
> Benedict v. Deshel, 177 N. Y., 1.

Therefore, we return to the question as to what will consti tute a "reasonable cause to believe that it was intended to give preference" on the part of the defendant.

"Reasonable cause to believe" that a debtor was insolvent (under the old statute) was made out when such a state of facts was brought to the creditor's notice respecting the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that he was unable to meet his obligations as they matured in the ordinary course of business.

Buchanan v. Smith, 16 Wall., 277.

"Reasonable cause to believe" in the present statute has been defined as a case which does not require proof either of actual knowledge or actual belief on that subject, but only such surrounding circumstances as would lead an ordinarily prudent man to conclude that a preference was intended.

Crittenden v. Barton, 5 Am. Bank Rep. 775. (Not elsewhere reported.)
In re Eggert, 102 Fed. Rep., 735.
The same, 98 Fed. Rep., 843.
In re Jacobs, 99 Fed. Rep., 539.
Wetstein v. Franciscus, 133 Fed. Rep., 900.
Suffel v. McCartney Nat. Bk., 106 N. W., 837; Am. Bank Rep., 259. (Not elsewhere reported.)
Hackney v. Raymond Bros. Clark Co., 10 Am. Bank Rep., 213. (Not elsewhere reported.)

While it has been held that it was not necessary for the trustee to prove that the transferee knew of the bankrupt's insolvency at the time of the transfer, yet it is difficult to conceive of a case where some knowledge of insolvency, or of facts which would put the transferee upon inquiry, was not necessary, because if there was no insolvency then there could be no preference or attempt at a preference.

Benedict v. Deshel, 177 N. Y., 1.
In re Andrews, 144 Fed. R., 922.
In re Eggert, 98 Fed. Rep., 843.

It has been further held that the creditors must have knowledge of **facts**, and that a mere guess or suspicion is not enough.

In re Eggert, 102 Fed. R., 735.
Off v. Hakes, 142 Fed. Rep., 364.
Grant v. National Bank, 97 U. S., 80.
Barbour v. Priest, 103 U. S., 297.
Stucky v. Masonic Savings Bank, 108 U. S., 75.

Cannon v. James M. Bell Co., 34 Misc (N. Y.,) 374.
Parsall v. Nassau Nat. Bk of Brooklyn, 74 App. Div. (N. Y.,) 89.

Under the former bankruptcy statute, it was held that a creditor dealing with a debtor who he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment, or take security, without necessarily violating the bankruptcy law. When such creditor is unwilling to trust a debtor further, or feels anxious about his claim, the obtaining additional security or the receiving payment of the debt is not prohibited, if the belief which the act requires is wanting.

Stucky v. Masonic Savings Bank, 108 U. S., 74.
Grant v. National Bank, 97 U. S., 80.

Also, a creditor has reasonable cause to believe a debtor, who is a trader, to be insolvent when such a state of facts is brought to the creditor respecting the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that he was unable to meet his obligations as they matured in the ordinary course of business.

Toof v. Marta, 13, Wall., 40.

The principle of these cases last cited is generally recognized as applicable to the provisions of the present bankruptcy law.

Off v. Hakes, 142 Fed. Rep., 364.

As further illustrating the interpretation placed by the courts upon this provision of the present statute, it has been held that where the creditor knew the debtor's business was bad, and it was necessary to continually press the debtor for payment, the creditor may be said to have had reasonable cause to believe that a preference was intended (Thomas v. Adalman, 136 Fed. Rep., 973) though the mere taking of security is not of itself sufficient to show knowledge (Matter of Alden, 16 Am. Bank Rep., 362; not elsewhere reported;) but that most of the bankrupt's indebtedness to a creditor was past due at the time of a payment on account is not sufficient to charge the creditor with notice of the bankrupt's insolvency and that a preference was intended. (In re Goodhile, 130 Fed. Rep., 471.)

Upson v. Mt. Morris Bank, 103 App. Div., N. Y., 367.

The rule that where the transaction is capable of two inferences, one in favor of its integrity and the other to the contrary, the inference in favor of the position that no fraud upon the law was attempted is the one that must prevail and compels the Court to exonerate a transfer charged as a preference under the bankrupt law in a doubtful case.

Perry v. Booth, 67 App. Div. N. Y., 235.

It appears in this case that the Newport Knitting Company was located and doing business at Newport, which was twenty-two miles from Little Falls, where the defendant was located and doing business, (Transcript of record, page 24, Fol. 35;) that the Newport Knitting Company kept its bank account and did its banking business at Newport, and that the only transaction that the defendant ever had with it was the discounting and renewal of the note in question at the request of the Titus Sheard Co.

There is not a word of evidence to show that the defendant, or any of its officers or agents, knew at any time, prior to the bankruptcy, or at least prior to the time when the Newport Knitting Company was placed in the hands of a receiver in the State Court, about the 18th of October, 1903, (transcript of record, page 22, Fol. 33,) that it was insolvent or unable to pay its debts.

It further appears that all the transactions with reference to the note in question were carried on by Titus Sheard Co., through Titus Sheard, the latter's president, and that the last mentioned company on the 26th of September, 1903, paid and took up the note in question with its own funds, for the purpose not only of discharging its obligation as surety on the note, but also of redeeming its own bills receivable which it had assigned and pledged to the defendant as security for the note on the 22nd of August preceeding.

Nothing appears from which any question can be raised that the money used to pay the note was **not** the money of the Titus Sheard Co., or that it was accepted by the defendant without any knowledge of the insolvency of the Newport Knitting Company, or any fact by reason of which the defendant was charged with knowledge that the payment was being made by the Newport Knitting Company, or for its benefit, or with a view of aiding the Titus Sheard Co. in acquiring a

preference against the Newport Knitting Company. There is not a line of evidence that the defendant knew or ever learned that the Newport Knitting Company owed a dollar other than the five thousand dollar note defendant held.

If the evidence shows that the payment in question was an illegal preference, it was to the Titus Sheard Co. and not to the defendant.

In other words, if any right of action accrued to the plaintiff by reason of the payment of the note, it was against the Titus Sheard Co., which, by paying and taking up the note, possibly gained the advantage of relieving itself from liability to the defendant on account of its endorsement, and at the same time, by getting possession and title to the note, was in a position to use it as an offset to the account which the Newport Knitting Company held against it.

If it had appeared that the Newport Knitting Company had actually placed with the Titus Sheard Co. the full amount represented by the note in question, to the defendant as the holder, the defendant could, notwithstanding, under the facts in this case, have proved the note in the full amount against the bankrupt's estate.

In re Wyly, 106 Fed. Rep., 38.

If the plaintiff were suing as the trustee in bankruptcy of the Titus Sheard Co., and not of the Newport Knitting Co., and all the elements necessary for a recovery by the plaintiff had been proved, except the one below referred to, he could not succeed, because the transaction creating the preference did not take place within four months of the filing of the petition; it clearly appearing, without dispute, that the accounts receivable, which were assigned by the Titus Sheard Co. as security for the note, were assigned to the defendant on the 22d day of August, which was more than four months before the filing of the petition.

Sabin v. Camp, 98 Fed. Rep., 974.
In re Little, 110 Fed. Rep., 621.

Again, to put the matter in another light, if we assume that the Titus Sheard Co. was the bankrupt, and that the defendant held its note for $5,000, the same as in this case, and that the plaintiff was suing as its trustee to recover the amount paid

on the note as a preference, same as now, he could not succeed, because the defendant would not be a "creditor" of the Titus Sheard Co. within the meaning of the bankruptcy law, for the reason that its debt or claim was not "provable" in bankruptcy because secured, and, consequently, the payment of the same by the Titus Sheard Co., and the redemption of the collateral pledged as security for the same, was entirely legal, even though the defendant actually knew that the Titus Sheard Co. was entirely insolvent at the time of such payment.

Richardson v. Shaw & Davidson, 16 Am. Bank Rep., 842. (Not elsewhere reported.)
Bankruptcy Law, Sec. 57, subdivision e.
In re Little, 110 Fed. Rep., 621.
Young v. Upson, 115 Fed Rep., 192.
In re West Norfolk Lumber Co., 112 Fed., Rep., 759.

The plaintiff cannot claim that the knowledge of Titus Sheard, who was a director of the defendant, of any facts, which, if brought to the defendant itself, would have made it resaonable to believe that the payment was intended as a preference, was chargeable to the defendant because said Sheard was in no way acting for the bank, but entirely in behalf of his own business and interest.

Craigie v. Hadley, 99 N. Y., 131.
Mayor v. Tenth Nat. Bank, 111 N. Y., 457.
Constant v. University of Rochester, 111 N. Y., 604.
Holden v. New York & Erie Bank, 72 N. Y., 294.
Fulton Bank v. N. Y. & Sharon Canal Co., 4 Paige, page 127 and note.

First Nat Bank v. Ocean Nat. Bank, 60 N. Y., 292.
Getman v. Oswego Nat. Bank, 23 Hun, N. Y., 503.
Bank of the U. S. v. Davis, 2 Hill, N. Y., 463.
Crooks v. People's Nat. Bank, 72 App. Div., N. Y., 331.

This case differs materially from the case of Crooks v. People's National Bank, 72 App. Div., N. Y., 331, above cited.

In that case King was the president of the bank and the chief executive officer, while in this case Sheard was a director only, and so far as evidence goes did not parcipitate in the affairs of the bank. He was on no committee and only oc

casionally attended meetings of the board. (Transcript of record, page 47-48, Fols. 66-67.)

It further appears that the Titus Sheard Co. was largely indebted to the bank and that efforts were being put forth by the bank against his company to obtain payment of these obligations, including the note in question, and that he and his company had agreed in substance, to pay off everything before the succeeding first day of January. (Transcript of record, page 53, Fol. 73; page 74, Fol. 104-105.)

It also appears, by the papers and correspondence annexed to the evidence, that Sheard had agreed to collateral all of the indebtedness of his concern down to $25,000, and that pursuant to such arrangement had on the 22nd of August, more than four months before the filing of the petition against the Newport Knitting Company, actually assigned and pledged to the bank good accounts receivable for $6,300 as security for the note in question.

It further appears that the Titus Sheard Co., with its own money, paid up the note and redeemed its collateral on the 26th of September, and that the bank delivered the same to the company.

All of these facts and circumstances go to show that the transaction was between Titus Sheard and the Titus Sheard Co. on the one side, and the defendant on the other, and that the attitude of the parties was in effect antagonistic and hostile and that the acts of Sheard can in no way be construed as being in the interest of the bank.

In the Crooks case it was held that the circumstances showed that King, although nominally operating on his own account, was in substance and effect operating for the bank, and that what he did tended to benefit the latter.

In this case the effect of Sheard's and his Company's conduct was just the opposite, because the inference is that Sheard desired to get possession of the note and the collateral security for his own use and not to confer any benefit or advantage upon the defendant.

Quoting from the opinion of Mr. Justice Smith, in the Crooks case, at page 335:

"An agent owes a duty to his principal to disclose to him "any information which he may have which may be relevant

"to the agency. The law conclusively presumes that the agent "makes such disclosures, unless the agent has some private "purpose to accomplish, the accomplishment of which would be "imperiled thereby. * * * He was asking no favor of the "bank the granting of which would be imperiled by the know- "edge of his insolvency. * * * The case is not one in which the "agent was negotiating at arms' length for his own advant- "age. Knowledge of his insolvency would only have made the "bank the more willing to accept the substituted paper."

Referring to these suggestions, suppose that Mr. Sheard had gone to the defendant and told it that he wished to pay the note for the purpose of using the same as an offset against the claim which he owed the Newport Knitting Company, and that the latter was insolvent, facts which were alone in the mind of Sheard and not known to the defendant, what would the answer of the bank have been? Being prudent persons so far as appears, most likely the reply would have been:

"If we accept your proposal and do what you wish we will make ourselves liable to an action on behalf of the trustee of the Newport Knitting Company to recover the amount paid as a preference and also lose our right to look to your company as endorser, because we are expected to surrender this note and also to give up our $6,300 worth of collateral, and we would therefore prefer that you let the matter stand just as it is."

But suppose that Sheard had persisted in making the payment and taking his collateral away? Then all the defendant could have done would have been to take the position that the note was not due and could not be paid before maturity, which was on November 22d. Then if the Titus Sheard Co. had again applied and tendered the amount due upon the note, it would have been entitled to receive same from defendant, together with the collaterals, and nothing that the defendant could have done or said would have prevented it, though it might have been aware of the insolvency of the Newport Knitting Company, and that it was Sheard's intention to use the same as an offset to the claim against his company.

Further quoting from the same opinion on page 335:

"He was substituting demand paper for his obligations, "part of which were not yet due. Even if its probable effect "was to give King further time, although demand paper was

"given, the greater advantage was to the bank, in which was "substituted good paper for poor."

In this case the bank had no poor paper. Outside of the endorsement of Titus Sheard Co., and the security offered by the $6,300 worth of merchandise accounts, the bank held other security in the nature of life insurance policies, stocks, etc., which owing to Sheard's sudden death, paid all of the company's obligations in full. If the note had not been paid by the Titus Sheard Co., it is clear that the same would have ultimately been paid in full to the bank.

Again, whatever knowledge Sheard had obtained of the insolvency of the Newport Knitting Co., it was plainly not obtained in any transaction in which he was operating for the defendant by reason of the fact that he was one of the directors.

In the case of Bank of United States v. Davis, 2 Hill, N. Y., 463, it is stated:

"I agree that notice to a director,or knowledge derived "by him while not engaged officially in the business of the "bank, cannot and could not operate to the prejudice of the "latter."

But, nevertheless, the bank was in that case held liable, because the director, who had so acquired the knowledge, subsequently acted officially in a matter which such knowledge affected, and, therefore, his knowledge was charged against the bank.

See also Casco Nat. Bank v. Clark, 139 N. Y., (307) 313.

In the case of Holden v. New York & Erie Bank, cited above, it was stated:

" The knowledge of Ganson as an individual or as an ex- " ecutor was not imputable to the bank **merely because he was** " **its president,** but because when it acted through him as " president in any transaction where that knowledge was ma- " terial and acceptable, **it acted through an agent** who at that " time had a knowledge of facts which gave character to the " transaction. * * * "

The Crooks case was affirmed in 177 N. Y., 68, but without directly passing upon the question as to whether the knowledge of King was knowledge to the bank. In doing so the

Court of Appeals deemed itself able to avoid passing upon the point by holding that the question involved a disputed matter of fact over which it had no jurisdiction, and, therefore, decided to affirm the order appealed from rather than to dismiss the appeal. (See Opinion, page 70.)

The Crooks case differs in another important respect from the present one. In fact one of the points there involved is a direct authority for the position which the defendant takes here.

The second cause of action in that case was to recover from the bank $2,600 in overdrafts for which the bank held security of the value of $2,000 in the form of some water bonds. King & Son, the bankrupts, induced John H. King, who was in no way connected with the firm, to make his note for $3100 to H. D. Thompson, who endorsed the same, and it was deposited in the bank to the credit of the bankrupt firm and the water bonds held as collateral by the bank were delivered over to the bankrupts. To secure John H. King for his liability on the note, H. E. King, the senior member of the bankrupt firm, assigned to him a certain bond and mortgage. This transaction was sustained.

The Court, in its opinion, at page 333, says:

"The fact that the overdraft of $2,600 was at the time substantially secured by water stock of Howard E. King, which was held as collateral thereto, would give full warrant to the finding of the Trial Court that the transfer of the mortgage to John H. King was not made with the intent to create a preference for the benefit of the bank."

There are a number of other cases which tend to sustain the transaction.

In the case of Upson v. Mt. Morris Bank, 103 App. Div., 371, the attorneys for the alleged bankrupt drew their own check on their own bank account (which had been increased by the deposit therein of some insurance money belonging to the bankrupt) in payment of a note given by the bankrupt. It was stated that it was doubtful if this payment constituted a transfer by the bankrupt.

In re New, 116 Fed. Rep., 116, it was held, in a case where the insolvent debtor paid money on a note to his creditor, that his surety upon that note, after paying the same, could prove

the balance due without returning the payment made to the original holder.

In the case of North v. Taylor, 61 App. Div., N. Y., 255, it appeared that some time before the fraudulent transfer by the bankrupt, the transferee took up a note of the latter payable to the wife of the transferee, and gave his own note in lieu thereof, and caused the bankrupt's note to be surrendered to him. Held, that the trustee had no recourse against the wife as having obtained a preference, she having no part in the scheme and not having received any of the bankrupt's assets.

In the same case, it further appeared that the transferee undertook to pay, as part of the purchase price of the stock of goods, two notes given by the bankrupt and endorsed by the defendants, and afterwards actually paid the same from his own funds. In proceedings to have this transfer set aside, it was held that the endorsers, having no knowledge of the facts and having no "reasonable cause to believe that it was intended thereby to give a preference" could not be held liable within Section 60 of the bankrupt act.

The suggestion of the complainant that D. H. Burrell, the president of the defendant, became informed as to the condition of the Newport Knitting Company because in August he went into the office of the Titus Sheard Company, where the books of the Newport Knitting Company were, and learned the contents of the books, is preposterous. There is no evidence in the case that Mr. Burrell was at the office of the Titus Sheard Company. He says in one of his letters that he had spent a couple of hours with Mr. Sheard, but that proves nothing. There is not a word of testimony in the case which shows that Mr. Burrell was giving the matter of the Newport Knitting Company or its indebtedness any attention whatever, or that he learned anything about it.

There are no facts shown from which any one outside of the Newport Knitting Company could infer in August or September, or prior to the middle of October, that there was any insolvency or trouble in the affairs of the Newport Knitting Company. Its business was going on as usual; the factory was running with a Superintendent in charge; goods were being shipped out every day upon orders of customers, exactly as before.

It was claimed by the appellant in the Court below that the

reason a new note was given on the 22d of August, when the collateral was delivered, was that the bank expected to obviate the effect of taking the collateral by the execution of a new note. There is no force to that suggestion. In law it would have been just as well to have taken the collateral of the Titus Sheard Company without a new note. That certainly did not affect the relation between the defendant and the Newport Knitting Company. The Newport Knitting Company had no interest in the collateral.

The fact that the note was taken up by the Titus Sheard Company before maturity has no significance. The Titus Sheard Company having seen fit to discount this note with the defendant and secure its endorsement thereof with its own collateral, had a right to pay the amount to the bank at any time and take up its own collateral and is a matter with which the Newport Knitting Company had nothing whatever to do. The only effect of it was to restore the Titus Sheard Company to the same position it was in when it originally took the note from the Newport Knitting Company.

All the evidence that was given in this case about the organization and capitalization of the Newport Knitting Company and of the Homer P. Snyder Manufacturing Company and of the Titus Sheard Company, has no relevancy to or bearing upon the issue in this case. The defendant had no knowledge whatever, or understanding, or information about these companies, or the organization thereof, or how the capital was held, or how it had been paid for. It knew nothing about that, and it cared nothing about it. Possibly the evidence about the stock of the Newport Knitting Company might be pertinent upon the question of its insolvency. The other evidence upon these subjects ought not to have been received.

## POINT V.

**The decree of the District Court was wholly inequitable as against the Defendant and violated the maxim, "He who seeks equity must do equity."**

The defendant held a lawful demand not only against the bankrupt but against Titus Sheard Company; it also held, properly and lawfully, the property of the Titus Sheard Company as security for the payment of the note. It had a right

to prove its claim in bankruptcy and receive the dividend and out of the collateral, which it held, make up the deficiency. The defendant did a perfectly lawful thing in accepting payment. In the usual course of business, and with no thought of wrong, it accepted the money from the responsible indorser and surrendered the note and collateral. There was no fraud or unlawful taint in that transaction.

Can the complainant now recover the money which the defendant received without placing the defendant in as favorable position as it was, holding the note and the collateral? Even when a party procures a voidable preference it does not work to deprive him of his provable debt against the bankrupt.

Is it true that when a bank holds a note indorsed by a responsible indorser and has the property of that indorser pledged as collateral security, if approached by the indorser with a proposal to pay the debt and take up his pledged collateral, the bank must decline, except at the risk of having to pay the money over to the Trustee in bankruptcy and lose the money, and also the note and the collateral in a so called equitable action brought by the Trustee?

If the statute against preferences can be used as such a sword as that, it works a result which was not contemplated in the adoption of the law.

The plain duty of the complainant was to collect the account of the bankrupt against the Titus Sheard Company, and so save this defendant from the demand. If there is any liability against this defendant it certainly did not prevent the remedy of the complainant against the Titus Sheard Company. If the defendant has to pay this $5,000.00 to the Trustee it has no remedy against anybody, not even to the extent of being able to prove the debt against the bankrupt and share in the dividend. Under such circumstances the complainant is in the situation of a double fund creditor and his duty is in equity to resort to the liability of Titus Sheard Company in the interest of protecting this defendant. That duty he seeks to evade by this action.

## POINT VI.

**The judgment was properly reversed by the Circuit Court of Appeals because the complainant's proper remedy was by an**

action at law to recover the amount of the alleged preference.

. In the first place, Section 60 of the Bankrupt Law provides that a trustee of a bankrupt may "recover the property or its value," which language implies that an ordinary action at law was intended. This certainly would be the case, except where it was necessary in order to recover the property transferred to set aside the transfer, as in a case of real estate or similar property, where an action to remove a transfer as a cloud upon the title might be maintained.

2. The facts alleged do not bring the case under any equitable head, such as fraud, mistake, trusts and the like.

Neither is it necessary to proceed in equity for the sake of the remedy, as for discovery, because there is no allegation of want of full knowledge of the whole transaction.

In fact, all the essential facts which would be necessary in an action at law are set out quite fully and with reasonable positiveness.

The distinction between law and equity is preserved because the Constitution of the United States forbids any infringement of the right of trial by jury.

Root v. Railway Co., 105 U. S., 189, 206.

Further, The United States statutes provide that suits in equity shall not be sustained in either of the Courts of the United States in any case where there is a plain, adequate and complete remedy at law.

Revised Statutes of the United States, Section 723.

The United States Supreme Court has construed this statute to mean that whenever a Court of law is competent to take cognizance of a right and has power to proceed to judment, which affords a plain, adequate and complete remedy without the need of a Court of Equity, the plaintiff must proceed at law because the defendant has a constitutional right to a trial by a jury.

Hipp v. Babin, 19 How., 271.
Insurance Co. v. Bailey, 13 Wall., 615.

"This enactment certainly means something; and if only "declaratory of what was always the law, it must at least have

" been intended to emphasize the rule and to impress it upon " the attention of the Courts."

N. Y. Guaranty Co. v. Memphis Water Co., 107 U. S., 205, 214.

It has also been held that when the action is simply for the recovery of possession of specific real and personal property, or for the recovery of a money judgment, the action is one at law.

Whitehead v. Shattuck, 138 U. S., 146, 151

" By inadequacy of the remedy at law is here meant, not " that it fails to produce the money,—that is a very usual result " in the use of all remedies—but that in its nature or charcter " it is not fitted or adapted to the end in view."

Thompson v. Allen Co., 115 U. S., 550, 554.

Under Section 5239 of the Revised Statutes of the United States, which provides that every director of a National Bank who participates in or assents to any violation of the statutes relating to banks, "shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained in consequence of such violation," it has been held that the action to enforce such liability must be brought on the law side of the court.

Stevens v. Overstolz, 43 Fed. Rep., 771.

The Court of Appeals of this State, and several of the Appellate Divisions, have held that the action by a trustee to recover property transferred under this section of the bankruptcy law was properly an action at law where there was no public record to be reformed, no deed or conveyance to be set aside, nor any other relief asked than the simple recovery of a sum of money.

Cohen v. Small, 120 App. Div., 211.
Do., Affirmed without opinion, 190 N. Y., 568.
Coudert v. Jarvis, 114 App. Div., 913.
Do., Affirmed, 188 N. Y., 584.
Merritt v. Halliday, 107 App. Div., 596.
Stern v. Mayer, 99 App. Div., 427.

These cases, or some of them, proceeded upon the further ground that this section of the bankruptcy act created an implied contract between the trustee and the transferee.

In the case of Cohen v. Small, 120 App. Div., at page 216, Mr. Justice Clarke says:

"The bankruptcy law enters in the contract between the "debtor and a creditor and gives a right to the trustee in "bankruptcy to recover from the creditor any payment made "in violation of the bankruptcy law. It is not for a penalty "nor upon a tort. A contract is implied, based upon the pro- "visions of the law under which the trustee of the bankrupt "proceeds. It is a cause of action given by the statute to the "trustee, which statute renders invalid the preference and the "payment by the insolvent debtor to the creditor. It comes "with the class of implied contracts wherein an obligation to "repay is imposed by law irrespective of the purpose of the "parties."

Equity jurisdiction may be invoked although there is also a remedy at law, unless the remedy at law, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity confers under the same circumstances.

Kilbourn v. Sunderland, 130 U. S., 505.
Litchfield v. Ballou, 114 U. S., 190.
Lewis v. Cocks, 23 Wall., 466.

The Court will look behind the relief demanded and into the facts set forth in the bill, and if it finds that the same would support an action at law, the latter would be the appropriate remedy and the bill would fail for want of equity jurisdiction.

Litchfield v. Ballou, 114 U. S., 190.
Lewis v. Cocks, 23 Wall., 466.

Where a party brings a suit in equity, complaining of an injury for which he has a plain, complete and adequate remedy at law, the bill must be dismissed.

Parker v. Winnipiseogee, &c., Co., 2 Bl., 545.

Applying the rules and principles above referred to, the Court will find upon examining the pleadings and evidence in this case, that it should have been brought as a purely law action, and that no reason whatever exists for bringing it on the

equity side of the Court, and the bill was therefore properly dismissed.

## POINT VII.

**The decree of the Circuit Court of Appeals should be affirmed with costs.**

MYRON G. BRONNER,
Solicitor for Defendant-Appellee,
Little Falls, N. Y.

## NATIONAL BANK OF NEWPORT, NEW YORK, *v.* NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 172. Argued February 28, 29, 1912.—Decided May 27, 1912.

To constitute a preference under the Bankruptcy Act it is not necessary that the transfer be made directly to the creditor; it may be made to another for his benefit, and if preferential circuity of arrangement will not avail to save it.

Unless, however, the creditor takes by virtue of a disposition by the insolvent debtor of his property for the benefit of the creditor so that the estate is diminished the creditor cannot be charged with receiving a preference.

Where the endorser of the bankrupt's note, which is under discount at a bank and secured by the endorser's own collateral, pays the note, thereby recovering his collateral and charges the payment to the bankrupt to whom he is indebted in a larger sum on open account, there is no preferential payment to the bank which the trustee can recover from it as such, it not appearing that the bank was concerned with, or had any knowledge of, the relations between the endorser and the maker of the note.

172 Fed. Rep. 529, affirmed.

THE facts, which involve the question of whether a payment was an illegal preference under the Bankruptcy Act of 1898, are stated in the opinion.

*Mr. Henry J. Cookinham* for appellant:

Payment of the note was preferential.

The uncontradicted evidence shows that the debtor was insolvent at the time of the payment. There was a payment or transfer of property to defendant or for its benefit. The payment or transfer of property was a preference and the recipient received more, upon its debt, than the other creditors of the bankrupt. The creditor knew or had reasonable cause to believe, that a preference

was intended. The transfer was made within four months of filing the petition in bankruptcy.

The fact that the note was paid before due raises the presumption that the payment was preferential. No evidence was given to overcome the presumption.

Any payment, out of the ordinary course of business, is presumptive evidence of the intent of the insolvent to give a preference. *Graham* v. *Stork*, Fed. Cas. No. 5678; *Walbrun* v. *Babbitt*, 16 Wall. 577; *Hardy* v. *Gray*, 144 Fed. Rep. 922; *Dokkin* v. *Page*, 147 Fed. Rep. 438; *In re Gesas*, 146 Fed. Rep. 734.

The bank took what was virtually a general assignment from the Sheard Company.

The statute has reaffirmed the common law in regard to the knowledge of an agent being imputed to the principal.

It is not necessary that the transfer or payment should be direct to the defendant. If the effect of any transfer or payment is to prefer one creditor to his knowledge over the others, the transfer or payment will be set aside, for the benefit of the general creditors, no matter by what subterfuge it was effected. *In re Sanderson*, 149 Fed. Rep. 273; *In re Hockney* v. *Raymond*, 10 A. B. Rep. 213; *In re Beerman*, 112 Fed. Rep. 663; *Western Tie & Lumber Co.* v. *Brown*, 129 Fed. Rep. 728; *Benjamin* v. *Chandler*, 142 Fed. Rep. 217.

It is not necessary to show that a creditor has actual knowledge that the debtor is insolvent. The circumstances which would lead an ordinary prudent man to believe that a preference was intended is sufficient. *Sundheim* v. *Ridge Ave. Bank*, 138 Fed. Rep. 951; *In re Himes*, 144 Fed. Rep. 543; *In re Virginia Hard Wood Mfg. Co.*, 139 Fed. Rep. 209; *Parker* v. *Black*, 143 Fed. Rep. 560; *Webb* v. *Sachs*, Fed. Cas. No. 11,325; *Coder* v. *McPherson*, 152 Fed. Rep. 951.

The facts bring this case under the rule as to what will be considered knowledge or reasonable cause to believe

the debtor insolvent and that a preference is intended. *Thomas* v. *Adelman*, 136 Fed. Rep. 973; *West Philadelphia Bank* v. *Dixon*, 95 U. S. 180; *Merchants' National Bank* v. *Cook*, 95 U. S. 342; *Rogers* v. *Palmer*, 102 U. S. 263; *Sage* v. *Wynkoop*, 104 U. S. 319; *In re Eggert*, 102 Fed. Rep. 735.

The rule is that it is not necessary to show that a creditor has actual knowledge that the debtor is insolvent. The circumstances which would lead an ordinary prudent man to believe that a preference was intended is sufficient. In this case, however, the creditor had actual knowledge that the Newport Knitting Company was insolvent at the time of the payment. *Sundheim* v. *Ridge Ave. Bank*, 138 Fed. Rep. 951; *In re Himes*, 144 Fed. Rep. 543; *In re Virginia Hard Wood Mfg. Co.*, 139 Fed. Rep. 209; *Parker* v. *Black*, 143 Fed. Rep. 560; *Webb* v. *Sachs*, Fed. Cas. No. 11,325; *Coder* v. *McPherson*, 152 Fed. Rep. 951.

*Mr. Myron G. Bronner* for appellee.

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought in the District Court of the United States for the Northern District of New York by Charles B. Mason, as trustee in bankruptcy of the Newport Knitting Company, to recover the amount of an alleged preference. Decree for the complainant was reversed by the Circuit Court of Appeals, which remanded the cause with instructions to dismiss the bill. *Mason* v. *National Herkimer County Bank*, 172 Fed. Rep. 529. Subsequently, the trustee assigned the claim in suit to the National Bank of Newport, New York, which was substituted as complainant and brought this appeal.

The bankrupt, the Newport Knitting Company, was organized in 1900, by Titus Sheard and his associates, and was engaged in the manufacture of knit goods at Newport, New York. Proceedings for its voluntary dissolution were begun in October, 1903, and on December 30, 1903, a

petition in bankruptcy was filed against it. It was adjudged a bankrupt on January 23, 1904.

Several of the officers and directors of this company were also officers and directors of a corporation known as the Titus Sheard Company, which manufactured knit goods at Little Falls. Titus Sheard was the leading spirit in both corporations; in each his son-in-law was the secretary and his nephew the general manager. The books of the Newport Knitting Company were kept at the office of the Titus Sheard Company. It does not appear that either company held stock in the other, nor is it shown to what extent the same persons had a stock interest in both. And upon the record the conclusion must be that, while the management of the two concerns was largely in the same hands, they were distinct organizations conducting separate businesses.

The Titus Sheard Company had a deposit account and discounted its paper with the defendant, the National Herkimer County Bank of Little Falls, of which Sheard was a director. The Newport Knitting Company was not a customer of the defendant bank, but kept its account with the National Bank of Newport.

The transaction which is alleged to constitute a preference was as follows: On January 7, 1901, the Newport Knitting Company gave its note for $5,773.05, at four months, to the Titus Sheard Company to pay for machinery and supplies. The Titus Sheard Company endorsed the note and had it discounted by the defendant bank, receiving the avails for its own use. The note was reduced by part payment to $5,000, and for this sum it was renewed every four months with like endorsement, the last renewal of this sort being on May 11, 1903.

In August, 1903, the defendant bank held a large amount of paper made or endorsed by the Titus Sheard Company and insisted upon security. Thereupon the Titus Sheard Company submitted to the bank a statement of its af-

fairs and on August 11, 1903, executed an instrument, also signed by Mr. Sheard and certain other officers individually, by which, after reciting the determination to liquidate its business, they purported to pledge its "mill property, all the machinery in the same, and the warehouse, together with all our assets of our Company, and also the individual properties, as per list hereto attached, to secure the National Herkimer County Bank for all notes of ours which they now hold, or may hereafter hold, and for all paper endorsed by us now held by the Bank, or that may be held by it in the future." This agreement evidently contemplated that the Titus Sheard Company should continue in possession of its property and should have charge of the winding up of its affairs on the understanding expressed, which was, in substance, that the property should be speedily converted into money, that bills payable held by creditors other than the bank should be renewed so far as possible, and that "all surplus moneys as fast as collected, not required to pay the outstanding notes held by other creditors," should be applied in payment of the indebtedness to the bank. It was declared to be the intention to dispose of the property so that all the indebtedness should be paid before January 1, 1904.

On August 22, 1903, there was substituted for the above-mentioned note of the Newport Knitting Company, endorsed by the Titus Sheard Company and held by the bank, a new three months' note of the Newport Knitting Company for the same amount, similarly endorsed; and the Titus Sheard Company secured this note by the delivery to the bank of specific assignments of its bills receivable, amounting to $6,300. On September 26, 1903, before maturity, the Titus Sheard Company paid to the bank the amount of this note, less accrued interest, $4,953.33, and took up the note and collateral. This payment was made by the Titus Sheard Company acting in its own behalf by a check drawn against the funds to

its credit in the bank. The amount so paid was then charged by that company to the Newport Knitting Company to which it was indebted on open account in a larger sum; and on the books of the Newport Knitting Company a corresponding credit was given to the Titus Sheard Company. So far as appears, this charge of the sum paid on the note against the amount owing to the Newport Knitting Company was not known to the bank.

It is insisted that this transaction amounted to a preference of the bank by the Newport Knitting Company. It is said that "the bankrupt parted with property to the amount of the note and the bank received it and was benefited to that amount," to the detriment of the other creditors of the Newport Knitting Company, then insolvent; or, as the District Court put it, that "a short cut was taken by common consent and the check was passed to the bank and the amount charged to the Knitting Company so that it in fact paid the note."

The pertinent provisions of the Bankruptcy Act as they stood at the time the transaction occurred, were as follows:

"Sec. 60. Preferred Creditors.—*a*. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. . . .

"*b*. If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it. A "transfer" includes "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Sec. 1 (25). It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors. The "accounts receivable" of the debtor, that is, the amounts owing to him on open account, are of course as susceptible of preferential disposition as other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference whether he procures the payment to be made on his behalf by the debtor in the account—the same to constitute a payment in whole or part of the latter's debt—or he collects the amount and pays it over to his creditor directly. This implies that, in the former case, the debtor in the account, for the purpose of the preferential payment, is acting as the representative of the insolvent and is simply complying with the directions of the latter in paying the money to his creditor.

But, unless the creditor takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished, the creditor cannot be charged with receiving a preference by transfer. *Western Tie & Timber Company*

v. *Brown*, 196 U. S. 502, 509; *Rector* v. *City Deposit Bank*, 200 U. S. 405, 419. "These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminution of the bankrupt's estate." *N. Y. County Bank* v. *Massey*, 192 U. S. 138, 147.

Here, the payment to the bank did not proceed from the bankrupt, the Newport Knitting Company. The Titus Sheard Company had a standing quite apart from its relation to the Newport Knitting Company as a debtor in the account. In the transaction with the bank, the Titus Sheard Company acted on its own behalf. As the holder of the original note, that company had endorsed it to the bank, taking for its own benefit the proceeds of the discount. Its obligation as endorser was continued by the renewals, and to secure the bank on the last renewal it had deposited its own collateral. It took up the note with its own funds and received back the security. Neither directly nor indirectly was this payment to the bank made by the Newport Knitting Company, and the property of that company was not thereby depleted.

The fact then is not, as it is contended, that "the bankrupt parted with property to the amount of the note and the bank received it," but rather that the bankrupt parted with nothing, and the bank received the money of the endorser and redelivered to the endorser the paper and collateral. When the Titus Sheard Company took up the note, it was credited with the amount of the payment in its account with the Newport Knitting Company. But the question, in the circumstances disclosed, of the right of the Titus Sheard Company to a set-off against its indebtedness on the account is distinct from the question whether the bank received a preference. *Western Tie & Timber Company* v. *Brown*, *supra*. It would be only by the allowance of such a set-off that the bankrupt estate would be diminished. And, as was said by the Circuit

Court of Appeals, "if the Sheard Company, knowing the Newport Company to be insolvent, acquired the note with a view to using it as a set-off or counterclaim against its debt, it could not legally do so (Bankruptcy Law, sec. 68*b*)." The amount of the indebtedness of the Titus Sheard Company could still be collected by the trustee.

It is urged that by virtue of the instrument already mentioned, which was executed by the Titus Sheard Company on August 11, 1903, all the assets of that company had been assigned to the bank, and hence that the security placed with the bank on the last renewal of the note was already held under this instrument and continued to be so held after the note was taken up, despite the surrender of the specific assignments. It is said further that as a result of the execution of this instrument, the bank "stepped into the place of the Sheard Company," and knew the condition of the account with the Newport Knitting Company and the charge that was made to it.

The argument attributes to the instrument undue importance and an effect which it did not accomplish. It was far from being an adequate legal security. Apparently, the Titus Sheard Company was left in the possession of the property, and its officers continued its management with freedom to sell, to collect accounts, to pay outstanding notes held by others than the bank (so far as they could not be renewed), and generally to liquidate the business in accordance with the expressed intention to convert the assets into money as speedily as possible and thus to meet all the obligations to the bank. To this end, the company and its officers were to "work faithfully" and the surplus moneys as fast as realized were to be devoted to the payment of the indebtedness. It was natural that the bank should require security for the note of a more definite and satisfactory character, that is, proper collateral. And when the bank received the specific collateral deposited by the Titus Sheard Company on the

renewal, the bank obtained a control over it which otherwise it did not possess, and this control it surrendered on the redelivery. In view of the effort that was being made to reduce the obligations of the company held by the bank, it cannot be thought surprising that the note with the collateral was taken up before maturity. It was not shown that the bank had anything to do with the credit to the Titus Sheard Company in its account with the Newport Knitting Company. Nor does it appear that the bank knew of the condition of this account or had any reason to believe that it was proposed to set off the payment against an indebtedness to the bankrupt.

The bank dealt with the Titus Sheard Company as the endorser of the paper; and the trustee failed to establish any right to recover the moneys it received.

*Decree affirmed.*